(9)

No. 01-618-CFX Title: Eric Eldred, et al., Petitioners
v.
John D. Ashcroft, Attorney General

Docketed: October 11, 2001 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Oct 11 2001	Petition for writ of certiorari filed. (Response due December 13, 2001)
	Nov 2 2001	Order extending time to file response to petition until December 13, 2001.
	Nov 26 2001	Brief amicus curiae of Copyright Law Professors filed.
	Dec 13 2001	Brief of respondent John D. Ashcroft in opposition filed.
	Dec 13 2001	Brief amici curiae of Jack Balkin, Yochai Benkler, Burt Neuborne and Jed Rubenfield filed.
	Dec 13 2001	Brief amicus curiae of Internet Archive filed.
	Dec 13 2001	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, et al. filed.
	Dec 13 2001	Brief amici curiae of American Association of Law Libraries, et al. filed.
	Dec 19 2001	DISTRIBUTED for Conference of January 4, 2002
	Dec 20 2001	Reply brief of petitioners Eric Eldred, et al. filed.
	Jan 7 2002	REDISTRIBUTED for Conference of January 11, 2002
	Jan 14 2002	REDISTRIBUTED for Conference of January 18, 2002
	Feb 11 2002	REDISTRIBUTED for Conference of February 15, 2002
	Feb 19 2002	Petition GRANTED. SET FOR ARGUMENT October 9, 2002. **********
	Feb 25 2002	Order granting petition for writ of certiorari amended to read as follows: The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition.
	Mar 1 2002	Extension of time to file the petitioner's brief on the merits and joint appendix granted. Due on May 20, 2002
	Apr 12 2002	Brief amici curiae of Progressive Intellectual Property Law Association, et al. filed.
	Apr 18 2002	Consent to the filing of amicus briefs in support of either party or of neither party received from counsel forthe petitioners.
	May 17 2002	Brief amici curiae of National Writers Union, et al. filed.
	May 20 2002	Joint appendix filed.
	May 20 2002	Brief of petitioners Eric Eldred, et al. filed.
	May 20 2002	Brief amici curiae of George A. Akerlof, et al. filed.
	May 20 2002	Brief amicus curiae of Intel Corporation filed.
	May 20 2002	Brief amici curiae of Eagle Forum Education and Legal Defense Fund, et al. filed.
	May 20 2002	Brief amicus curiae of Hal Roach Studios & Michael Agee filed.
	May 20 2002	Brief amici curiae of Jack Balkin, Yochai Benkler, Burt Neuborne and Jed Rubenfield filed.
	May 20 2002	Brief amicus curiae of Intellectual Property Law Professors filed.
	May 20 2002	Brief amicus curiae of Free Software Foundation filed.

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No. 01-618-CFX

Entry	Date	Proceedings and Orders
	May 20 2002	Brief amici curiae of College Art Association, et al. filed.
	May 20 2002	Brief amici curiae of Tyler Ochoa, Mark Rose, Edward Walterscheid filed.
	May 20 2002	Brief amicus curiae of Malla Pollack filed.
	May 20 2002	Brief amici curiae of American Association of Law Libraries, et al. filed.
	May 20 2002	Brief amici curiae of Internet Archive, et al. filed.
	May 30 2002	Order extending time to file respondent's brief on the merits to and including August 5, 2002.
	Jul 29 2002	Brief amicus curiae of Edward Samuels filed.
	Aug 1 2002	CIRCULATED.
	Aug 2 2002	Brief amicus curiae of Nashville Songwriters Association International filed.
	Aug 2 2002	Brief amicus curiae of International Coalition for Copyright Protection filed.
	Aug 5 2002	Brief of respondent John D. Ashcroft, Attorney General of the United States filed.
	Aug 5 2002	Brief amicus curiae of Motion Picture Association of America, Inc. filed.
	Aug 5 2002	Brief amicus curiae of Recording Industry Association of America filed.
	Aug 5 2002	Brief amici curiae of Directors Guild of America, et al. filed.
	Aug 5 2002	Brief amici curiae of Association of America Publishers, et al. filed.
	Aug 5 2002	Brief amici curiae of F. James Sensenbrenner, et al. filed.
	Aug 5 2002	Brief amicus curiae of Orrin G. Hatch filed.
	Aug 5 2002	Brief amicus curiae of New York Intellectual Property Law Association filed.
	Aug 5 2002	Brief amicus curiae of Intellectual Property Owners Association filed.
	Aug 5 2002	Brief amici curiae of American Society of Composers,Authors and Publishers, et al. filed.
	Aug 5 2002	Brief amicus curiae of American Intellectual Property Law Association filed.
	Aug 5 2002	Brief amici curiae of Bureau of National Affairs, Inc., et al. filed.
	Aug 5 2002	Brief amicus curiae of Songwriters Guild of America filed.
	Aug 5 2002	Brief amici curiae of Dr. Seuss Enterprises, et al. filed.
	Aug 5 2002	Brief amici curiae of Symphonic and Concert Composers, et al. filed.
	Aug 5 2002	Brief amicus curiae of AOL Time Warner, Inc. filed.
	Aug 5 2002	Brief amicus curiae of Recording Artists Coalition filed.
	Aug 5 2002	LODGING consisting of 15 copies each of two DVDs received from counsel for amicus Motion Picture Association ofAmerica. Nine sets distributed.
	Aug 5 2002	Brief amicus curiae of Amsong, Inc. filed.
	Aug 15 2002	Record filed.
	Sep 4 2002	Reply brief of petitioners Eric Eldred, et al. filed.
	Sep 4 2002	Record filed.
	Oct 9 2002	ARGUED.

(1) Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, In his official capacity as Attorney General,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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105pp

QUESTIONS PRESENTED

1. Did the D.C. Circuit err in holding that Congress has the power under the Copyright Clause to extend retrospectively the term of existing copyrights?

2. Is a law that extends the term of existing and future copyrights "categorically immune from challenge[] under the First Amendment"?

3. May a circuit court consider arguments raised by *amici*, different from arguments raised by a party, on a claim properly raised by a party?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit were petitioners Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviecraft, Inc., Dover Publications, Inc., and Copyright's Commons, and Janet Reno in her official capacity as Attorney General of the United States and her successor, John D. Ashcroft. None of these parties is either publicly held or affiliated with an entity that is so held. The Eagle Forum Education and Legal Defense Fund, L. Ray Patterson, Laura N. Gasaway, and Edward Walterscheid, as well as the Sherwood Anderson Literary Estate Trust, Sherwood Anderson Foundation, the American Society of Composers, Authors, and Publishers, AmSong, Inc., the Association of American Publishers, Inc., Broadcast Music, Inc., the Motion Picture Association of America, the National Music Publishers' Association, Inc., the Recording Industry Association of America, Inc., and the Songwriters Guild of America appeared as *amici curiae* in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviecraft, Inc., Dover Publications, Inc., and Copyright's Commons respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a) is reported at 239 F.3d 372. The order denying the petition for rehearing and for rehearing en banc (App. 24a) is reported at 255 F.3d 849. The memorandum opinion of the district court (App. 34a) is reported at 74 F. Supp. 2d 1.

JURISDICTION

The judgment of the United States Court of Appeals was issued on February 16, 2001, and the petition for rehearing and for rehearing *en banc* was denied on July 13, 2001. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Patent and Copyright Clause confers upon Congress the Power

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

U.S. Const., art. I, § 8, cl. 8.

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.*, amend. I.

The pertinent provisions of the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. § 304), and the other copyright laws cited in this petition are reprinted in the appendix. App. 40a - 67a.

STATEMENT OF THE CASE

This case is about the limits on Congress' Copyright Clause power. The Constitution gives Congress the power to "promote the Progress of Science" by granting "exclusive Right[s]" "to Authors" for "limited Times." U.S. Const., art. I, cl. 8. In establishing this power, the Framers intended that copyright terms be, as Justice Story described them, "short," and that after that "short interval," creative works would fall into the public domain "without restraint." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 502, at 402 (R. Rotunda & J. Nowak eds., 1987).

Congress has now found a clever way to evade this simple constitutional command. By repeatedly extending the terms of existing copyrights—as it has eleven times in the past forty years[1]—Congress has adopted a practice that defeats the Framers' plan by creating in practice an unlimited term. These extensions were initially brief (one or two years). In 1976, the

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[1] *See* Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, Title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 94-553, § 304, 90 Stat. 2572 (1976); Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998). This pattern is radically different from the history of copyright during the Republic's first 150 years. In the first hundred years of copyright, Congress extended the term of copyrights once. Act of February 2, 1831, §§ 1-2, 4 Stat. 36. In the next fifty years, Congress again extended the terms only once. Act of March 4, 1909, § 4, 35 Stat. 1075, 1076. While these earlier extensions also applied to existing copyrights, the first extension in 1831 cannot be attributed to the Framers (no Framer sat in Congress in 1831), and two extensions in 150 years cannot be held to be a constitutionalized practice.

extension was nineteen years. Pub. L. No. 94-553, §304, 90 Stat. 2572. In the statute at issue in this case, the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 Congress has extended the term of existing and future copyrights by twenty years. *Id.* § 102(b).

Because of the CTEA, works originally authored in 1923 that would have fallen into the public domain in 1998 could now remain under copyright until 2019—a term of 95 years. And because of the CTEA, future copyrights will now extend for the life of the author plus 70 years (which for an author who produced in the pattern of Irving Berlin would mean a term of 140 years), or in the case of works for hire, 95 years. These terms contrast against the Framers' initial term of just 14 years, renewable once only if the author survived. Act of May 31, 1790, § 1, 1 Stat. 124.

1. Petitioners are various individuals and businesses that rely upon the public domain for their livelihood. Some, such as the lead plaintiff Eric Eldred, build free Internet libraries based upon public domain works; others, such as Dover Press, publish public domain works in high-quality commercial editions. All depend upon a rich public domain to support their work, and many make their work freely available to others.

2. In January 1999, petitioners filed a facial challenge to the CTEA, arguing (a) that its retrospective aspect (extending the terms of existing, or "subsisting," copyrights by twenty years) exceeded Congress' power under the Copyright Clause, violated the First Amendment, and violated the public trust doctrine, and (b) that its prospective aspect (extending the terms of future copyrights by twenty years) violated the First Amendment. The United States moved for judgment on the pleadings, and petitioners cross-moved for summary judgment. The District Court upheld the statute and dismissed the case. App. 34a. Petitioners appealed the rulings on its Copyright Clause and First Amendment claims.

3. The Court of Appeals, over the dissent of Judge Sentelle, affirmed the District Court's judgment. App. 1a. The court first rejected petitioners' First Amendment argument. While the court held that petitioners had standing to raise a First Amendment challenge to both the prospective and retrospective aspects of the CTEA, App. 4a, the court held the substance of petitioners' claim barred by circuit precedent and this Court's decision in *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985). App. 5a-7a. According to the circuit court, *Harper & Row* established that there is no "first amendment right to exploit the copyrighted works of others." App. 8a. By challenging a statute that extends the term of subsisting copyrights, petitioners, the court held, were "by definition" asserting a "first amendment right to exploit the copyrighted works of others." *Id.* Petitioners' claim was therefore indistinguishable from the defendant's claim in *Harper & Row*. App. 5a-8a. The circuit court thus transformed the narrow holding of *Harper & Row* into a general rule that "copyrights are categorically immune from challenges under the First Amendment." App. 6a. (interpreting D.C. Circuit authority). (The court did not explain how its reasoning would apply to petitioners' First Amendment challenge to future copyrights, which, because applying to works that have not yet been created, "by definition" cannot be the assertion of a "first amendment right to exploit the copyrighted works of others.")

The court also rejected petitioners' Copyright Clause claims. First, the court rejected petitioners' argument that extending the term of subsisting copyrights would violate the "originality" requirement of the Copyright Clause, which limits copyright to works that are "original." *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991). Though the court acknowledged that extending a copyright to a work that had fallen into the public domain would violate the "originality" requirement, App. 8a, it held that extending the terms of subsisting copyrights would not. App. 8a-9a.

Second, the court rejected petitioners' argument that the "limited Times" condition should be read in light of the

Copyright Clause's grant of power—"To promote the Progress of Science." So understood, retrospective extensions would not be "limited" in a constitutional sense. To bar retrospective extensions as unlimited in a constitutional sense. App. 10a. Instead, the court held that the grant of power "To promote the Progress of Science" does not restrict the scope of Congress' power *at all*. The circuit court therefore interpreted the "limited Times" condition independently of the requirement that Congress "promote the Progress of Science," and held that an extension (or multiple extensions) of a "limited" term was permissible so long as the extension itself was limited. App. 10a-14a.

Finally, in rejecting petitioners' Copyright Clause claim, the court refused to consider an argument of *Amicus* Eagle Forum that the "promote [] Progress" requirement is an independent constraint on Congress' power. The court held instead that it should not reach *Amicus's* argument because petitioners had not expressly adopted it in their brief. App. 11a.[2] In response to Judge Sentelle's two dissents, however, the court stated that, had it reached the argument of *Amicus*, it would have rejected that argument. App. 11a, App. 25a. That argument has therefore not been waived in this Court. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("[i]t suffices for our purposes that the court below passed on the issue presented").

4. Judge Sentelle dissented from the panel's decision with respect to the Copyright Clause claims. App. 16a. Following this Court's approach in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), Judge

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[2] Petitioners expressly endorsed the argument of *Amicus* at oral argument before the D.C. Circuit. Tr. of Oral Arg. 17-18; App. 29a. In light of circuit authority, petitioners did not believe it was necessary to view the "grant of power" as an independent "substantive" constraint on Congress' Copyright authority. App. 11a. Petitioners continue to agree with Eagle Forum that the CTEA is unconstitutional under either the narrow rule that petitioners have advanced, or under the broader argument endorsed by Eagle Forum.

Sentelle reasoned that a court must find the "outer limits" to a power granted Congress. To find this "outer limit," Judge Sentelle asked whether "the rationale offered in support of [the extension of power] has any stopping point." App. 16a (Sentelle, J., dissenting). In this case, the answer was "no." The government had argued that any extension would be constitutional so long as it was "limited." App. 18a. That "rationale," Judge Sentelle reasoned, led to an "unlimited view of the copyright power"—just the same sort of "unlimited view" that this Court had "rejected with reference to the Commerce Clause in *Lopez*." App. 17a.

Instead, Judge Sentelle maintained that the proper limit to Congress' power is found by "returning to the language of the clause itself"—in particular, its "grant of power." Interpreting that language, Judge Sentelle wrote:

> [I]t is impossible that the Framers of the Constitution contemplated permanent protection, either directly obtained or attained through the guise of progressive extension of existing copyrights. . . . Extending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time.

App. 18a-19a.[3] Thus, Judge Sentelle concluded, a law that purports to extend the term of a subsisting copyright is beyond Congress' Copyright Clause power. App. 19a.

5. Petitioners filed for rehearing and rehearing *en banc*. The panel declined rehearing, and the D.C. Circuit denied rehearing en banc. App. 24a. Judge Sentelle, joined by Judge Tatel,

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[3] *See also* Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 Colum.-VLA J.L. & Arts 137, 171 (1999) (extending term of existing works "cannot enhance the quantum of creativity from the past, but it can compromise the creativity of the future, by delaying for twenty years the time at which subsequent authors may freely build on these works."); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 329 n.192 (1970) (arguing that an "additional incentive to produce is irrelevant").

dissented from the denial of rehearing en banc. Judge Sentelle argued that en banc review was merited both because the rule of the panel "effectively eliminates any role for *amicus curiae* in the practice of this circuit," App. 28a (Sentelle, J., dissenting), and, "more importantly," because "the Court's construction of the Copyright Clause . . . renders Congress' power under Art. I, § 8, cl. 8, limitless despite express limitations in the terms of that clause." App. 31a. As Judge Sentelle wrote,

> Once a work is published . . . extending the copyright term does absolutely nothing to induce further creative activity by the author—and how could it? The work is already published [and a] simple finding by Congress to the contrary is not sufficient to demonstrate that the exercise of that power is "necessary and proper."

Id.

REASONS FOR GRANTING THE WRIT

As this Court has made increasingly clear, Congress' power is constrained by both express and implied limitations in the Constitution's grants of power. These constraints can inhere "in the very language" of the grant itself. *United States v. Lopez*, 514 U.S. 549, 553 (1995) (commerce clause); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) ("the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power"). They can be found in the express terms conditioning particular grants of constitutional power. *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982) (uniformity requirement in bankruptcy clause). Or they can flow from "presupposition[s]" that the Constitution "confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (11th Amendment).

The power at issue in this case is also and likewise constrained. Congress' power to grant "exclusive right[s]," incident to the power "To promote the Progress of Science," is expressly limited by the text of the Copyright and Patent Clause. It is expressly limited by the First Amendment. And it is

impliedly limited to works that are "original." *Feist Publ'ns v. Rural Tel. Sen. Co.*, 499 U.S. 340, 345 (1991).

These limitations were established by the Framers to assure a rich public domain, and to avoid the temptation to corruption that state-backed monopolies (as the Framers understood copyrights to be[4]) inevitably invite. They thus effected a regime that requires that monopolies over speech only be granted as a *quid pro quo* for producing something new—as this Court described it, for producing something that "add[s] to the sum of useful knowledge." *Graham v John Deere Co.*, 383 U.S. 1, 6 (1966). *See also Brenner v. Manson*, 383 U.S. 519, 534 (1966) (describing "[t]he basic *quid pro quo* contemplated by the Constitution"). *See generally* Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1162-63 (2000) (describing "*quid pro quo* principle").

The question in this case is whether this same power to grant monopolies as a *quid pro quo* for creating original works can also be used to grant monopolies to "something already in existence," *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)—*quid*

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[4] *See* 1 THE REPUBLIC OF LETTERS 512, 566 (James Morton Smith ed., 1995). Jefferson was strongly opposed to the Constitution's grant of power to Congress to create monopolies. As he wrote to Madison, "It is better . . . to abolish . . . Monopolies, in all cases, than to do it in any . . . . The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression." 13 THE PAPERS OF THOMAS JEFFERSON 442-43 (Julian P. Boyd ed., 1956). Madison's response concedes the general fear. "With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?" *Id.* at 21. *See also* Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1150, 1160-62 (2000) (describing the suspect nature of a grant of power to secure monopolies).

pro nihilo. The court below held that it can, finding that extensions of subsisting terms were constitutional so long as each extension is limited. App. 9a-11a.

This holding nullifies the Framers' plan. By abstracting the term "limited Times" from the full text of the Copyright Clause, the circuit court has rendered meaningless the Framers' plain and express intent to restrict the duration of monopolies over speech. Under the authority of this case, Congress can now continue the practice of extending the term of subsisting copyrights without limit. It can thus achieve a perpetual copyright term "on the installment plan." Statement of Professor Peter Jaszi, *The Copyright Term Extension Act of 1995: Hearings on S.483 Before the Senate Judiciary Comm.*, 104th Cong. (1995), *available at* 1995 WL 10524355, at *6.

The "installment plan" was not the Framers' plan, and this Court should grant review to reverse this holding—both because of the significance of the issues at stake, especially as it they affect the emergence of the Internet, and because of the conflicts in the lower courts that this case evinces about the nature of Congress' Copyright Power.

Because of the CTEA, an extraordinary range of creative invention will be blocked from falling into the public domain until at least 2019—or longer if Congress extends the copyright term again. Thus, just at the time that the Internet is enabling a much broader range of individuals to draw upon and develop this creative work "without restraint," Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 502, at 402, extensions of copyright law are closing off this medium to a broad swath of our common culture.[5]

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[5] The significance of the CTEA is only multiplied by the other changes that Congress has made to copyright law. Because protection is automatic, and there is no longer any requirement of renewal, *see* Pub. L. 102-307, title I, § 102(a) & (d), 106 Stat. 264, 266 (repealing renewal requirement), an extraordinary range of creative work now falls into a regulatory black hole—unusable because the "owners" of this property are unknown or unknowable,

This Court should also grant review to resolve the confusion among the circuits both about the scope of Congress' Copyright Clause and about the interaction between Congress' copyright power and the First Amendment. The decision below conflicts with the Fifth Circuit's interpretation of Congress' copyright power, and reveals tensions with other circuits about the same power. The decision also conflicts with the Eleventh Circuit's approach to resolving alleged conflicts between the Copyright Clause and the First Amendment. This case provides the Court with an opportunity to resolve both dimensions of this confusion in authority.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS ABOUT THE LIMITS ON CONGRESS' POWER UNDER THE COPYRIGHT AND PATENT CLAUSE.

The Copyright and Patent Clause gives Congress the power:

> To promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.

U.S. Const., art. I, § 8, cl. 8.

As this Court has held, the Copyright Clause is "both a grant of power and a limitation." *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489

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and because the law criminalizes the use of such material without the copyright owner's permission. *See* No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 ("NET Act"), amending 17 U.S.C. § 506(a). These changes dramatically affect the work of artists, researchers, and archivists, as well as commercial entities that draw upon and reuse aspects of our culture. Rather than the rich public domain the Framers envisioned, upon which any may draw "without restraint," the effect of these changes is to create a mine field of regulations, extending copyright more broadly than at any time in our history. *See also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1, 13-20 (2001) (describing how the expansion of copyright law should alter the "definitional balance" with the First Amendment).

U.S. 141, 146 (1989) ("a grant of power and certain limitations upon the exercise of that power"). The "grant of power," as Judge Sentelle described it in dissent below, is the power "[t]o promote the progress of science and useful arts." App. 16a (Sentelle, J., dissenting). The means for exercising that power are those specified in the "by" clause—through "exclusive Right[s]" to "Authors" for their "Writings" for "limited Times."

The issue in this case is whether this "grant of power" also constrains Congress' Copyright Clause power—as this Court has held, for example, of Section 5 of the Fourteenth Amendment. *Kimel v. Florida Bd. of Regents*, 528 U.S. at 81 ("the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power"). Petitioners have argued that, at a minimum, the "promote [] Progress" requirement should inform the interpretation of the balance of the Clause, including the "limited Times" condition. *Cf. Wheaton v. Peters*, 33 U.S. (8 Peters) 591, 661 (1834) (Copyright Clause to be interpreted "with the words and sentences with which it stands connected"). So understood, a term is "limited" if it can reasonably be said to "promote the Progress of Science." Retrospective terms, which grant protection for work already in existence, could not in this sense be "limited."

Amicus Eagle Forum advanced a more expansive claim—that the "grant of power" should itself limit Congress' copyright authority, independent of the limitations expressed in the "by" clause. Under this reading, even if a copyright term were properly "limited," it must also be shown to "promote[] Progress."

The Court of Appeals rejected both arguments. Considering itself bound by its own circuit precedent, *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981), the court rejected the argument that "the introductory language of the Copyright Clause constitutes a limit on congressional power." App. 10a. The D.C. Circuit thereby "erase[d]," as Judge Sentelle wrote in dissent to the denial of rehearing *en banc*, "half of the Copyright

Clause—indeed, that half which defines the very power bestowed." App. 33a.

The Court of Appeals' holding contradicts this Court's authority, conflicts with the rule of the Fifth Circuit, and is in tension with the approach of at least four other circuits.

A. The Decision Below Conflicts With Authority Of This Court

As petitioners have argued, this Court has expressly held that the Patent and Copyright Clause is "both a grant of power and a limitation." *Graham*, 383 U.S. at 5. The "limitation" referenced in *Graham*, however, is not just the express limitation within the "by" clause—that terms are to be "limited," or that copyrights are to be granted to "Authors" for their "Writings." Instead, this Court has recognized important substantive limitations on Congress' Copyright Clause power that can *only* be understood to flow from the "promote the Progress of Science" requirement. The holding by the court below that "the introductory language" imposed no "limit" on Congress' Copyright Clause power contradicts this authority.

1. In *Graham* this Court explained that it would be beyond Congress' constitutional power to grant a patent to a work in the public domain. As the Court wrote, "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." 383 U.S. at 6. The court below indicated the same principle would limit Congress' power, "*mutatis mutandis*," with respect to copyrights. App. 9a. *Accord Bonito Boats*, 489 U.S. at 146; *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823 (10th Cir. 1993).[6]

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[6] The court below so indicated, even though the government informed the court during oral argument that Congress has purported to remove copyrighted works from the public domain. *See* Tr. of Oral Arg. 37-38, referring to the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514 (codified at 17 U.S.C. §§ 104A, 109(a)).

In both cases, however, the only possible source of such a restriction is the "promote the Progress of Science" requirement itself. There is no "public domain clause" in the Constitution. Works in the public domain clearly have "Authors"; they certainly include "Writings"; and Congress could plainly authorize such public domain copyrights for a "limited time." Absent the requirement that Congress "promote the Progress of Science," there would be no Copyright Clause reason to restrict Congress' power over the public domain. Yet this Court has clearly and repeatedly indicated that such a power is beyond Congress' Patent and Copyright Clause power. *See, e.g.*, *Graham*, 383 U.S. at 6; *Bonito Boats*, 489 U.S. at 146. That conclusion is flatly inconsistent with the holding below.[7]

2. Likewise with the requirement of "originality": As this Court has held, the only "Writings" that Congress may authorize for copyright protection are those that are "original." *Feist Publ'ns*, 499 U.S. at 345. "Originality" is a constitutional requirement—the "*sine qua non* of copyright. . . ." *Id.* As the *Trade-Mark Cases* held, the patents and copyrights clause power cannot extend to "something already in existence," 100 U.S. at 94 (1879), only something new.

But the Patent and Copyright Clause does not mention the term "original," and there is no doubt that under a literal reading of the term "Writings," "Writings" could include original as well as non-original works. If there is a constitutional limitation on the scope of the "Writings" to which Congress may extend copyright, then this limitation must derive from the "promote the Progress of Science" requirement. There is no other textual source for this restriction on Congress' otherwise plenary power. This conclusion again, however, flatly contradicts the conclusion of the Court of Appeals below.

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[7] The Court of Appeals recognized the tension between the circuit authority, *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), and this Court's opinion in *Graham*. *See* Tr. of Oral Argument 29-31.

3. These two lines of authority compel the conclusion that the "promote the Progress of Science" requirement constrains Congress' power under the Copyright Clause. Whether it constrains Congress' power by narrowing the scope of the terms within the "by" clause, including the "limited Times" condition, or, as *Amicus* Eagle Forum argued, by independently constraining Congress' copyright authority, the conclusion of the court below to the contrary is clearly wrong. The D.C. Circuit's opinion has rendered the "To promote the Progress of Science" requirement of the Copyright Clause mere "surplusage." *Lopez*, 514 U.S. at 589 (Thomas, J., concurring). The Framers and this Court clearly intended that it be much more.

B. The Decision Below Conflicts With The Rule Of The Fifth Circuit And With Authority From Other Circuits

The decision below also contradicts the rule of the Fifth Circuit, and is in tension with the approach of at least four other circuits.

In *Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), the Fifth Circuit addressed the question whether Congress could constitutionally grant copyrights to obscene works. Cinema Adult Theater argued that obscene works did not "promote the progress of Science and useful Arts," and were therefore not authorized under Congress' power "to promote the Progress of Science." *Id.* at 860.

The Fifth Circuit rejected Cinema Adult Theater's argument—but not because it believed Congress free of any constraint from the "promote[] Progress" requirement. To the contrary, the Court expressly acknowledged that while the "words of the copyright clause" do not require that *individual* copyrights be shown to "promote science or useful arts," they plainly do "require that *Congress* shall promote those ends." *Id.* at 859 (emphasis added) (citations omitted). And while the Court recognized that Congress has broad discretion in selecting the means that it believes may promote progress, the Fifth Circuit

clearly recognized that "Congress' power under this Clause *is limited to action that promotes the useful arts*." *Id.* at 860 (emphasis added).

The Seventh Circuit has embraced the same rule. In interpreting the scope of a claimed patent monopoly, then-Judge Stevens wrote for the Seventh Circuit,

> The source and purpose of the statutory monopoly must be kept in mind. "An author's 'Writing' or an inventor's 'Discovery' can, in the constitutional sense, only extend to that which is his own. It may not be broadened to include matters within the public domain. *The congressional power to grant monopolies for 'Writings and Discoveries' is likewise limited to that which accomplishes the stated purpose of promoting 'the Progress of Science and useful Arts.'*"

Frantz Mfg. Co. v. Phenix Mfg. Co., 457 F.2d 314, 327 n.48 (7th Cir. 1972) (emphasis added)(quoting *Lee v. Runge*, 404 U.S. 887, 890 (1971) (Douglas, J., dissenting from denial of certiorari)). The Seventh Circuit also followed a similar principle in a subsequent case interpreting the scope of joint authorship under the Copyright Act. That question should be resolved, the court held, by "focus[ing] on how well the test promotes the primary objective of the Act. This objective is not to reward an author for her labors, but 'to promote the Progress of Science and useful Arts.'" *Erickson v. Trinity Theatre*, 13 F.3d 1061, 1069 (7th Cir. 1994). *See also J.L. Mott Iron Works v. Clow*, 82 F. 316, 320 (7th Cir. 1897) ("Under the constitution, the power lodged with congress is not unlimited, but is restricted to the promotion of the progress of science and useful arts.").

The Ninth Circuit has followed the same method to narrow the scope of joint authorship. In *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 1999), the court indicated that "[t]he Constitution establishes the social policy that our construction of the statutory term 'authors' carries out. The Founding Fathers gave Congress the power to give authors copyrights in order 'to promote the progress of Science and useful arts.'"

The Second Circuit, too, has followed this method to guide the interpretation of the scope of "fair use." "Fair use" is a limitation on the scope of copyright. The Second Circuit has interpreted this limitation in light of constitutional purpose: "to serve [the] purpose ['to promote the Progress of Science'], 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry.'" *Rosemont Enter. Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966)(citing *Berlin v. E.C. Publs.*, 329 F.2d 541, 544 (2d Cir. 1964) (Kaufman, J.)).

Finally, the Eleventh Circuit has applied a similar method to interpret the scope of Section 201(c) of the Copyright Act, governing contributions to collective works. It is in light of "fundamental principles," the court wrote, that the words of the Copyright Act are to be interpreted. *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267, 1271 (11th Cir. 2001) ("In all cases involving copyright law, we understand that any interpretation and application of the statutory law must be consistent with the copyright clause of the United States Constitution . . . That clause is a limitation, as well as a grant, of the copyright power.") (citing Heald and Sherry, *supra*, 2000 U. Ill. L. Rev. 1119 (arguing the grant of power in the Copyright Clause constitutes a limit on Congress' copyright power, and concluding that retrospective extensions of copyright violate the Copyright Clause)).

The rule of the Fifth Circuit, and the approach of the Second, Seventh, Ninth, and Eleventh, is flatly inconsistent with the D.C. Circuit's conclusion that "the introductory language of the Copyright Clause constitutes [no] limit on congressional power." App. 10a. The conclusion of the Fifth Circuit is also inconsistent with the apparent rule of the Eighth Circuit. In a case that predates *Feist*, the Eighth Circuit held:

> [A]lthough the promotion of artistic and scientific creativity and the benefits flowing therefrom to the public are purposes of the Copyright Clause, *those purposes do not limit Congress's power to legislate in the field of copyright.*

Hutchinson Tel. Co. v. Fronteer Directory Co., 770 F.2d 128, 130 (8th Cir. 1985) (emphasis added).

This conflict will have significance far beyond the narrow issues of this case. Whether Congress is constrained by the plain language of the Copyright Clause will determine the scope of Congress' power to pass legislation to protect databases, or further to withdraw work from the public domain. Relying upon the view that the Constitution does not constrain it, some in Congress are presently pushing to expand the monopoly protections copyright law grants, without concern for whether these expansions truly "promote [] Progress." *See, e.g.*, The Collections of Information Antipiracy Act, H.R. 354, 106th Cong., 1st Sess. (1999) (extending copyright-like protection to facts within databases, *Feist* notwithstanding); Yochai Benkler, *Constitutional Bounds of Database Protection*, 15 Berkeley L. & Tech. J. 535, 575-87 (2000). Thus, waiting to clarify this conflict will only increase the costs of resolving it later.

By ignoring the "grant of power" and the purposes expressed in that grant, Congress has found a way to evade the Framers' clear intent. The D.C. Circuit has ratified that evasion. And Congress will now continue to act in reliance upon this ratification.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS ABOUT THE RELATIONSHIP BETWEEN CONGRESS' COPYRIGHT POWER AND THE RESTRICTIONS OF THE FIRST AMENDMENT.

Petitioners have raised a First Amendment challenge to both the retrospective and prospective aspects of the CTEA. They argue that both aspects are content neutral regulations of speech and the press, and therefore subject to intermediate scrutiny. Under intermediate scrutiny, petitioners submit, neither the retrospective nor the prospective extension of the copyright term

"advances important governmental interests" without burdening "substantially more speech than necessary." *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997). *See also Bartnicki v. Vopper*, 121 S. Ct. 1753, 1760-61 (2001); *United States v. O'Brien*, 391 U.S. 367, 382 (1968).

The D.C. Circuit, however, refused to apply ordinary First Amendment analysis to the CTEA, holding instead that *Harper & Row* in effect established a special First Amendment "immunity" for copyright legislation. App 5a-8a. Under the D.C. Circuit's rule, there can be no First Amendment challenge to a copyright statute, as any challenge to a copyright statute is simply a demand for access to particular copyrighted works. Such a demand, the circuit court held, was rejected in *Harper & Row*. Thus it follows, the court concluded, that "copyrights are categorically immune from challenges under the First Amendment." App. 6a.

The D.C. Circuit's application of *Harper & Row* is clearly mistaken. It is also in direct conflict with the approach of the Eleventh Circuit. And, more importantly, it evinces a confusion that *Harper & Row* has engendered about whether the First Amendment imposes any constraint on Congress in its enactment of legislation under the Copyright Clause.[8] This conflict is another reason this Court should grant review in this case.

A. The D.C. Circuit Has Mistakenly Expanded The Reach Of This Court's Decision In *Harper & Row*

In *Harper & Row*, this Court was asked to craft a public figure exception in the enforcement of a copyright. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 555-56 (1985). Harper & Row had an exclusive right to President Gerald

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[8] Professor Netanel attributes this confusion both to a misreading of the scope of *Harper & Row* and to a failure of courts to account for changes in First Amendment doctrine that would affect the interaction between the Copyright Clause and the First Amendment. *See* Netanel, *supra*, at 7-12.

Ford's autobiography. The Nation Magazine "scooped" part of that work without the copyright owner's consent. In defending against the enforcement of the copyright, The Nation argued that because the matter was of such public importance, First Amendment interests should trump Harper & Row's copyright interests. The Nation would therefore be excused from liability for trespassing on Harper & Row's right. The Nation did not argue that the copyright was invalid, or that copyright law could not extend to works such as this. It simply demanded that the First Amendment give it the right to trespass on the copyright owner's property.

This Court rejected The Nation's argument. As the Court explained, copyright functions as an "engine of free expression," *id.* at 558, by creating an incentive to produce speech that otherwise would not be produced. If a work lost its copyright protection simply because it became important, that would destroy much of the speech-inducing effect that copyright law produces. Thus, so long as copyright law regulates expression rather than ideas, *Harper & Row* holds that there is no First Amendment right to trespass on an otherwise legitimate copyright. *Id.* at 558-59. Private owners of intellectual property protected by copyright are able to exercise their rights free of the restrictions of the First Amendment, just as private owners of real property are generally able to exercise their rights free of the restrictions of the First Amendment. *Cf. Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (no first amendment right to trespass on real property).

The overwhelming majority of courts applying the *Harper & Row* rule have done so in the same factual context: In these cases, *Harper & Row* is relied upon to deflect a purported First Amendment right of access to otherwise legitimately copyrighted material.[9]

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[9] *See, e.g.*, *Worldwide Church of God* v. *Philadelphia Church of God*, 227 F.3d 1110, 1115-16 (9th Cir. 2000) (infringement case rejects First Amendment defense) (citing *Harper*); *Religious Tech. Ctr.* v. *Henson*, 1999

U.S. App. Lexis 11828, at *3 (9th Cir. 1999) (in "copyright infringement action" court relies upon *Harper* to hold "the Copyright Act already embrace[s] First Amendment concerns"); *Cable/Home Comm. Co.* v. *Network Prod., Inc.*, 902 F.2d 829, 850 (11th Cir. 1990) (rejecting "First Amendment affirmative defense regarding . . . copyright . . . violations," court held "first amendment is not a license to trammel on legally recognized rights in intellectual property") (citing *Harper*) (citations omitted); *New Era Publ'ns* v. *Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) (in injunction action to stop publication of allegedly infringing work, court rejects First Amendment defense: "Our observation that the fair use doctrine encompasses all claims of first amendment in the copyright field . . . never has been repudiated.") (citing *Harper*); *United Video* v. *FCC*, 890 F.2d 1173, 1190-91 (D.C. Cir. 1989) (court rejects petitioners' demand for access to copyrighted works "paid for and authorized under the compulsory licensing scheme" of the Copyright Act, holding "cases in which a first amendment defense is raised to a copyright claim do not utilize [intermediate scrutiny]") (citing *Harper*); *Los Angeles Times* v. *Free Republic*, 2000 U.S. Dist. Lexis 5669, at *78 (C.D. Ca. 2000) (rejecting defendant's First Amendment defense to copyright infringement, court held "courts have generally interpreted this discussion in *Harper & Row* to mean that First Amendment considerations are subsumed within the fair use analysis"); *Wojnarowicz* v. *American Family Ass'n*, 745 F. Supp. 130, 146-47 (S.D.N.Y. 1990) (in infringement action, court rejects First Amendment defense) (citing *Harper*); *Consumers Union of United States* v. *New Regina Corp.*, 664 F. Supp. 753, 761 n.10 (S.D. N.Y. 1987) (in infringement action, court rejects First Amendment defense) (citing *Harper*). Other courts have reached the same conclusion without applying *Harper* directly. *See A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (in infringement action, "First Amendment concerns in copyright are allayed by the presence of the fair use doctrine"); *Nihon Keizai Shimbun, Inc.* v. *Comline Bus. Data, Inc.*, 166 F.3d 65, 74-75 (2d Cir. 1999) (rejecting First Amendment defense to injunction enforcing copyright); *Twin Peaks Prod., Inc.* v. *Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993) (in an infringement action, court concludes "the fair use doctrine encompasses all claims of first amendment in the copyright field"); *Fisher* v. *Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986) (rejecting First Amendment defense for parodists); *Roy Export Co.* v. *CBS*, 672 F.2d 1095, 1099-1100 (2d Cir. 1982) (in infringement action, court concludes "no Circuit that has considered the question . . . has ever held that the First Amendment provides a privilege in the copyright filed distinct from the accommodation embodied in the "fair use" doctrine); *Dallas Cowboys Cheerleaders, Inc.* v. *Scoreboard Poster., Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979) (in infringement action, "first amendment is not a license to trammel on legally recognized rights in intellectual property"); *Wainwright Sec. Inc.* v. *Wall Street Transcript Co.*, 558 F.2d 91, 95 (2d Cir. 1977) (in infringement

The court below has now expanded this unexceptional holding to cover any First Amendment challenge within the domain of copyright—not just to the enforcement of a particular copyright, but also to a challenge of the statutes under which copyrights are established. Because there is no First Amendment right to trespass, the court below has held that there can be no First Amendment right to challenge the legal rule under which the property rights are set.

That conclusion cannot follow—as the D.C. Circuit's own authority in the context of abortion protester cases shows.[10] In those cases, the D.C. Circuit has rightfully held that there "is no general First Amendment right to trespass." *NOW v. Operation Rescue*, 37 F.3d 646, 655 (D.C. Cir. 1994). But the absence of a "First Amendment right to trespass" cannot mean that an abortion protester cannot challenge the law or injunction

action, court rejects First Amendment defense); *Georgia Television Co.* v. *TV News Clips of Atlanta*, 718 F. Supp 939, 947 (N.D. Ga. 1989) (in infringement action, court holds "conflicts between interests protected by the first amendment and copyright laws thus far have been resolved by application of the fair use doctrine") (citations omitted); *Walt Disney Co.* v. *Powell*, 698 F. Supp. 10, 12 (D.D.C. 1988), *vacated in part*, 897 F.2d 565 (D.C. Cir. 1990) (First Amendment "gives no right to steal another's statutorily protected intellectual property").

[10] That it does not follow can also be seen in the source of the *Harper & Row* rule itself. As many have noted, this Court in *Harper & Row* drew its "definitional balance" from the work of noted copyright scholar Melville Nimmer. *See e.g.*, Netanel, *supra*, at 11-12. Nimmer had first proposed this "balance" between the First Amendment and copyright in an important article published in 1970. Melville B. Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech And Press?*, 17 UCLA L. REV. 1180 (1970). In that article, Nimmer argued that so long as copyright protected expression only, there should ordinarily be no First Amendment claim that could be raised against the assertion of a copyright. *See id.* at 1197-99.

But in the very same article, Nimmer goes on to address the First Amendment interests affected by a retrospective extension of copyright. He concluded, as petitioners have argued, that such an extension would violate the First Amendment. *Id.* at 1194-95. His "definitional balance" therefore cannot be read to preclude this conclusion.

establishing the property right that is allegedly trespassed upon. State action *establishing* property rights is fully subject to First Amendment scrutiny, even if private action *exercising* these state established rights is subject to a narrower First Amendment rule. The D.C. Circuit's conclusion to the contrary is simply mistaken. *Cf. Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 737 (1996) (in reversing the D.C. Circuit's finding of no state action, this Court held that, though editorial decisions by cable system operators are not themselves state action, a statute giving operators such discretion is fully subject to First Amendment review).

B. The Opinion Below Conflicts With The Rule Of The Eleventh Circuit.

The decision below, refusing to apply ordinary First Amendment analysis to a statute modifying the Copyright Act, is in direct conflict with the Eleventh Circuit.

In *CBS Broadcasting Inc. v. EchoStar Communications Corp.*, No. 00-15378, 2001 WL 1081599 (11th Cir. Sept. 17, 2001), the Court of Appeals for the Eleventh Circuit upheld a provision of the Satellite Home Viewer Act, 17 U.S.C. § 119, and Satellite Home Viewer Improvement Act of 1999 ("Improvement Act"), Pub. L. No. 106-133, § 1001 *et seq.*, 113 Stat. 1537, 515 (West Supp. 2001), against a First Amendment challenge. The Improvement Act gave satellite carriers the right to a compulsory license for network programming delivered to private homes in "unserved households." *Id.* at *1. Defendant EchoStar challenged the statutory scheme, arguing that the distinction the statute drew was content based, and unjustified under the First Amendment.

The Eleventh Circuit rejected EchoStar's First Amendment claim. Unlike the D.C. Circuit, however, the Eleventh Circuit reached this conclusion by applying ordinary First Amendment analysis to the challenged statute. The court treated the Improvement Act as a content neutral regulation of speech. *Id.* at *14. It thus proceeded to apply intermediate scrutiny to that

content neutral copyright regulation, concluding that the restrictions served important governmental interests unrelated to the suppression of speech, and that those restrictions on "First Amendment freedoms [were] no greater than is essential to the furtherance of" those interests. *Id.* at *14-16.

Although defendant EchoStar was defending against a copyright infringement action brought by CBS and others, *id.* at *1, and although the Eleventh Circuit, like the D.C. Circuit, treated *Harper & Row* as setting the framework for its analysis, *id.* at *13, unlike the D.C. Circuit, the Eleventh Circuit did not treat *Harper & Row* as exhausting First Amendment analysis of the Improvement Act. Instead, the Eleventh Circuit expressly weighed the defendant's First Amendment interest according to ordinary First Amendment analysis. Intermediate scrutiny *of the statute* was appropriate, the court held, even though *Harper & Row* had rejected a First Amendment right to trespass *on particular copyrights*. *Id.* at *15.

Petitioners asked both courts below to apply the same test to the CTEA. Both courts refused. But under the reasoning of the Eleventh Circuit, petitioners would have been entitled to intermediate scrutiny. Indeed, petitioners' claim for intermediate scrutiny would have been stronger analysis than the defendant's in *EchoStar*. Unlike that defendant, petitioners do not claim a right to use otherwise legitimately copyrighted material; petitioners instead argue that the material at issue cannot legitimately be copyrighted. We challenge a statute that purports to create copyrights in a manner that is inconsistent with the First Amendment. But unlike the Court of Appeals for the Eleventh Circuit, neither the District Court nor the D.C. Circuit applied intermediate review of the CTEA. Instead, both courts treated *Harper & Row* as exhausting First Amendment analysis of a copyright statute.

This Court should grant review in this case to resolve this conflict. If *Harper & Row* indeed establishes the rule that copyright law is "immune from challenges under the First Amendment," then that rule is not being followed in at least the

Eleventh Circuit, as *EchoStar* demonstrates, nor possibly within the Second Circuit. *See Universal City Studios v. Reimerdes,* 111 F. Supp. 2d 294, 327-29 (S.D.N.Y. 2000) (applying intermediate scrutiny to Digital Millennium Copyright Act) (appeal pending). If, instead, *Harper & Row* simply establishes that the exercise of a copyright by a copyright holder is not subject to intermediate First Amendment scrutiny, then the decision below will short-circuit ordinary First Amendment review of copyright legislation in a range of related cases. As this confusion follows from *Harper & Row* itself, this Court should grant review to clarify the scope of the principle announced in *Harper & Row*.

Petitioners submit that outside the context of a First Amendment challenge to the assertion of an otherwise legitimate copyright (*i.e.,* a First Amendment right to trespass), ordinary First Amendment analysis should apply. There is no textual reason to exempt copyright law from ordinary First Amendment analysis. Nor is there any history to suggest that the Framers imagined copyright law to be exempt from First Amendment review. To the contrary, at least some expected that the First Amendment would be a check against unrestrained copyright power.[11] If a *sui generis* trademark law gets ordinary First Amendment review, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987), and regulations of the treasury governing currency get ordinary First Amendment review, *Regan v. Time, Inc.*, 468 U.S. 641 (1984), then petitioners

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[11] As a delegate to the Pennsylvania ratifying convention argued, in support of a First Amendment,

> Tho[ugh] it is not declared that Congress have a power to destroy the liberty of the press; yet, in effect, they will have it .... They have a power to secure to authors the right of their writings. Under this, they may license the press, no doubt; and under licensing the press, they may suppress it.

2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 454 (Merrill Jensen ed., 1976).

submit that copyright law is also constrained by the ordinary rules of the First Amendment.[12]

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[12] For a catalogue of contexts in which the First Amendment has been held to constrain private rights, see Netanel, *supra*, at n.12 (including private rights of privacy, protection against intentional infliction of emotional distress, libel, trademark, tortious interference with business relations, right of publicity, and trade secret protection).

CONCLUSION

For the forgoing reasons, petitioners submit that this Court should grant review in this case to reverse the holding of the D.C. Circuit with respect to Congress' power to grant copyrights retrospectively under the Copyright Clause. Petitioners would also ask this Court to remand the case to the District Court to apply intermediate scrutiny under the First Amendment to both the retrospective and prospective aspects of the CTEA.[13]

Respectfully submitted,

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[13] This case also presents a question for review about whether a Court of Appeals must ignore an argument made by an *Amicus* for a claim properly raised simply because a party has not expressly adopted that argument in its brief. In the court below, *Amicus* Eagle Forum argued that the "promote the Progress of Science" clause was an independent constraint on Congress' Copyright Clause power. While petitioners expressly embraced that argument at oral argument, App. 29a (Sentelle, J., dissenting), the D.C. Circuit held that *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring), required that it could not consider the argument of *Amicus*. This conclusion is wrong as an application of *Ashwander*, but this Court need not resolve this error. Because there is no doubt that petitioners have raised and properly preserved the claim that the extension of copyright terms is beyond Congress' Copyright Clause power, App. 31a (Sentelle, J., dissenting), and because the court below nonetheless considered and rejected the argument of *Amicus*, App. 11a-12a, 25a, there is technically no need for the Court to review this question in this appeal. Nonetheless, petitioners raise the question, and would defend the *Amicus's* right, to give this Court the opportunity to clarify the role of *amici* in argument.

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October 11, 2001

APPENDIX

239 F.3d 372

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.**

**Eric ELDRED, et al., Appellants,
v.
Janet RENO, In her official capacity as
Attorney General, Appellee.**

No. 99-5430.

Argued Oct. 5, 2000.
Decided Feb. 16, 2001.

Before: GINSBURG, SENTELLE, and HENDERSON, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Separate opinion dissenting in part filed by Circuit Judge SENTELLE.

GINSBURG, Circuit Judge:

The plaintiffs in this case, corporations, associations, and individuals who rely for their vocations or avocations upon works in the public domain, challenge the constitutionality of the Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827. This marks the first occasion for an appellate court to address whether the First Amendment or the Copyright Clause of the Constitution of the United States constrains the Congress from extending for a period of years the duration of copyrights, both those already extant and those yet to come. We hold that neither does.

I. Background

The CTEA amends various provisions of the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* The portions of the CTEA at issue here extend the terms of all copyrights for 20 years as follows: (1) For a work created in 1978 or later, to which an individual author holds the copyright, the Act extends the term to the life of the author plus 70 years. *See* Pub. L. No. 105-298 § 102(b)(1), 112 Stat. 2827; 17 U.S.C. § 302(a). (2) For a work created in 1978 or later that is anonymous, or pseudonymous, or is made for hire, the term is extended from 75 to 95 years from the year of publication or from 100 to 120 years from the year of creation, whichever occurs first. *See* Pub. L. No. 105-298 § 102(b)(3), 112 Stat. 2827; 17 U.S.C. § 302(c). (3) For a work created before 1978, for which the initial term of copyright was 28 years, the renewal term is extended from 47 to 67 years, thereby creating a combined term of 95 years. *See* Pub. L. No. 105-298 § 102(d), 112 Stat. 2827; 17 U.S.C. § 304. In all three situations, therefore, the CTEA applies retrospectively in the sense that it extends the terms of subsisting copyrights. As a result, the CTEA better aligns the terms of United States copyrights with those of copyrights governed by the European Union. *See* S. Rep. No. 104-315, at 7-8 (1996); Council Directive 93/98, art. 7, 1993 O.J. (L 290) 9.

The CTEA is but the latest in a series of congressional extensions of the copyright term, each of which has been made applicable both prospectively and retrospectively. In 1790 the First Congress provided, both for works "already printed" and for those that would be "[t]hereafter made and composed," initial and renewal terms of 14 years, for a combined term of 28 years. Act of May 31, 1790 § 1, 1 Stat. 124, 124. In 1831 the Congress extended the initial term to 28 years, thereby creating a combined term of 42 years. *See* Act of Feb. 3, 1831 § 1, 4 Stat. 436, 436. So the term remained until 1909, when the Congress extended the renewal term as well to 28 years,

making for a combined term of 56 years. *See* Act of March 4, 1909 § 23, 35 Stat. 1075, 1080.

Between 1962 and 1974 the Congress passed a series of laws that incrementally extended subsisting copyrights. *See* Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, title I, § 104, 88 Stat. 1873 (1974). In 1976 the Congress altered the way the term of a copyright is computed so as to conform with the Berne Convention and with international practice. *See* H.R. Rep. No. 94-1476, at 135 (1976), U.S.C.C.A.N. at 5659, 5751. Thenceforth the term would be the life of the author plus 50 years or, where there was no identifiable author, the earlier of 75 years from the year of publication or 100 years from the year of creation. *See* Pub. L. No. 94-553 §§ 302-05, 90 Stat. 2541, 2572-76 (1976). The CTEA amends this scheme by adding 20 years to the term of every copyright.

The plaintiffs filed this suit against the Attorney General of the United States to obtain a declaration that the CTEA is unconstitutional. Among the plaintiffs are a non-profit association that distributes over the internet free electronic versions of books in the public domain; a company that reprints rare, out-of-print books that have entered the public domain; a vendor of sheet music and a choir director, who respectively sell and purchase music that is relatively inexpensive because it is in the public domain; and a company that preserves and restores old films and insofar as such works are not in the public domain, needs permission from their copyright holders—who are often hard to find—in order to exploit them.

The district court entered judgment on the pleadings in favor of the Government and dismissed the plaintiffs' case in its entirety. On appeal, the plaintiffs renew their claims that the

CTEA both violates the First Amendment to the Constitution and is in various ways inconsistent with the Copyright Clause of Article I, § 8 of the Constitution, which authorizes the Congress: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

II. Analysis

The plaintiffs claim that the CTEA is beyond the power of the Congress and therefore unconstitutional for three reasons: first, the CTEA, in both its prospective and retrospective applications, fails the intermediate scrutiny appropriate under the First Amendment; second, in its application to preexisting works, the CTEA violates the originality requirement of the Copyright Clause; and third, in extending the term of subsisting copyrights, the CTEA violates the "limited Times" requirement of the Copyright Clause—a requirement that they say is informed by the goal of "promot[ing] the Progress of Science and useful Arts." Because each of these grounds presents a pure question of law, we consider them *de novo*. *See, e.g., United States v. Popa*, 187 F.3d 672, 674 (D.C. Cir. 1999).

A. First Amendment

The First Amendment aspect of the plaintiffs' complaint attacks the CTEA not only in its application to subsisting copyrights but also insofar as it extends the terms of copyrights for works yet to be created. The Government questions plaintiffs' standing to complain in the latter regard.

1. Standing

Consider first the plaintiffs' standing with respect to works that, though now subject to subsisting copyrights, will in due course enter the public domain: The plaintiffs benefit from using works in the public domain and, but for the CTEA, they would be able to exploit additional works the copyrights to

which would have expired in the near future. As such, they suffer an injury in fact that is traceable to the CTEA and that we could redress by holding the Act invalid. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Government concedes as much.

In view of the plaintiffs' standing to challenge the CTEA with respect to works already copyrighted, the Government's objection to the plaintiffs' standing with respect to works yet to be created seems very weak indeed. The plaintiffs benefit from works in the public domain and are deprived of that benefit so long as such works are under copyright. That is as true for works not yet created as for extant works on which the copyrights are about to expire; the Government does not draw any meaningful distinction between the two categories of works. We conclude therefore that the plaintiffs have standing to pursue their prospective claim under the First Amendment.

2. The merits

The decisions of the Supreme Court in *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539 (1985), and of this court in *United Video, Inc. v. FCC*, 890 F.2d 1173 (1989), stand as insuperable bars to plaintiffs' first amendment theory. In *Harper & Row* the Court held that a magazine's advance publication of excerpts from the memoirs of former President Gerald Ford infringed the copyright thereon. 471 U.S. at 569. In doing so the Court explained how the regime of copyright itself respects and adequately safeguards the freedom of speech protected by the First Amendment.

> [C]opyright's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." No author may copyright his ideas or the facts he narrates. 17 U.S.C. § 102(b). *See e.g., New York Times Co. v. United States*, 403 U.S. 713, 726, n.* (1971) (BRENNAN, J., concurring)

(Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed).

Id. at 556 (citation omitted).

The first amendment objection of the magazine was misplaced "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." *Id.* at 560.

In keeping with this approach, we held in *United Video* that copyrights are categorically immune from challenges under the First Amendment. There, certain cable companies petitioned for review of an FCC regulation providing that the supplier of a syndicated television program could agree to the program being broadcast exclusively by a single station in a local broadcast area. 890 F.2d at 1176-78. We rejected the first amendment aspect of their challenge as follows:

> In the present case, the petitioners desire to make commercial use of the copyrighted works of others. There is no first amendment right to do so. Although there is some tension between the Constitution's copyright clause and the first amendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression.

890 F.2d at 1191.

The plaintiffs argue that "these authorities are restricted solely to the narrow case where a litigant demands a right to use otherwise legitimately copyrighted material," which case is "plainly distinct from [this] First Amendment challenge[ ] to the constitutionality of the statute granting a [copy]right in the first instance." We think the plaintiffs' purported distinction is

wholly illusory. The relevant question under the First Amendment—regardless whether it arises as a defense in a suit for copyright infringement or in an anticipatory challenge to a statute or regulation—is whether the party has a first amendment interest in a copyrighted work. The works to which the CTEA applies, and in which plaintiffs claim a first amendment interest, are by definition under copyright; that puts the works on the latter half of the "idea/expression dichotomy" and makes them subject to fair use. This obviates further inquiry under the First Amendment.

The plaintiffs cite no case to the contrary. In two of the cases they do cite, *Reno v. ACLU*, 521 U.S. 844, 871-79 (1997), and *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-23 (1991), the Supreme Court held statutes unconstitutional under the First Amendment because they were unjustifiably content based; the plaintiffs here do not claim that the CTEA is anything but content neutral. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, also cited by the plaintiffs, the Court did indeed apply heightened scrutiny under the First Amendment to a statute granting the United States Olympic Committee trademark-like protection for the word "Olympic." 483 U.S. 522, 535-41 (1987). Restricting the use of particular words "runs a substantial risk of suppressing ideas in the process," the Court explained. *Id.* at 532. As we have seen, however, copyright protection cannot embrace ideas; it therefore does not raise the same concern under the First Amendment. Finally, although the plaintiffs assert that the Second Circuit has reached the merits of a first amendment challenge to an aspect of the Copyright Act of 1976, in fact that court, after reviewing the case law, concluded that the plaintiffs categorically lacked "any right to distribute and receive material that bears protection of the Copyright Act." *Authors League of America v. Oman*, 790 F.2d 220, 223 (1986).

As this is all the support plaintiffs muster for their proposition, we need not linger further in disposing of it. Suffice it to say we reject their first amendment objection to the CTEA because the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others.

B. Requirement of Originality

The plaintiffs' second challenge ostensibly rests upon *Feist Publications, Inc. v. Rural Telephone Service Co.*, in which the Supreme Court held that telephone listings compiled in a white pages directory are uncopyrightable facts: "The *sine qua non* of copyright is originality." 499 U.S. 340, 345 (1991). "Originality is a constitutional requirement" for copyright because the terms "Authors" and "Writings," as they appear in the Copyright Clause, "presuppose a degree of originality." *Id.* at 346.

The plaintiffs reason from this that the CTEA cannot extend an extant copyright because the copyrighted work already exists and therefore lacks originality. Not so. Originality is what made the work copyrightable in the first place. A work with a subsisting copyright has already satisfied the requirement of originality and need not do so anew for its copyright to persist. If the Congress could not extend a subsisting copyright for want of originality, it is hard to see how it could provide for a copyright to be renewed at the expiration of its initial term—a practice dating back to 1790 and not questioned even by the plaintiffs today.

The plaintiffs' underlying point seems to be that there is something special about extending a copyright beyond the combined initial and renewal terms for which it was initially slated. Nothing in *Feist* or in the requirement of originality supports this, however: All they tell us is that facts, like ideas, are outside the ambit of copyright. Undaunted in trying to advance their novel notion of originality, the plaintiffs point to cases that do not address the requirement of originality for

copyright *per se*. They point to no case or commentary, however, that calls into question the distinction between a new grant of copyright—as to which originality is an issue—and the extension of an existing grant. That distinction reflects, at bottom, the difference between the constitutionally delimited subject matter of copyright and the Congress's exercise of its copyright authority with respect to that subject matter.

The plaintiffs do point out that the Supreme Court has said the "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966). The Court similarly stated, over a century ago, that the issuance of a trademark could not be justified under the Copyright Clause because the subject matter of trademark is "the adoption of something already in existence." *Trade-Mark Cases*, 100 U.S. 82, 94 (1879). Applied *mutatis mutandis* to the subject of copyright, these teachings would indeed preclude the Congress from authorizing under that Clause a copyright to a work already in the public domain.

The plaintiffs read the Court's guidance more broadly, in the light of *Feist*, to mean that a work in the public domain lacks the originality required to qualify for a copyright. That is certainly not inconsistent with the Court's opinion: A work in the public domain is, by definition, without a copyright; where the grant of a copyright is at issue, so too is the work's eligibility for copyright, and thus the requirement of originality comes into play. We need not adopt a particular view on that point, however, as it has nothing to do with this case. Here we ask not whether any work is copyrightable—indeed, the relevant works are already copyrighted—but only whether a copyright may by statute be continued in force beyond the renewal term specified by law when the copyright was first granted. For the plaintiffs to prevail, therefore, they will need

something other than the requirement of originality upon which to make their stand.

C. The Limitation of "limited Times"

We come now to the plaintiffs' contention that the CTEA violates the constitutional requirement that copyrights endure only for "limited Times." This claim at last speaks to the duration rather than to the subject matter of a copyright: If the Congress were to make copyright protection permanent, then it surely would exceed the power conferred upon it by the Copyright Clause.

The present plaintiffs want a limit well short of the rule against perpetuities, of course. And they claim to have found it—or at least a bar to extending the life of a subsisting copyright—in the preamble of the Copyright Clause: "The Congress shall have power . . . To promote the Progress of Science and useful Arts. . . ." Their idea is that the phrase "limited Times" should be interpreted not literally but rather as reaching only as far as is justified by the preambular statement of purpose: If 50 years are enough to "promote . . . Progress," then a grant of 70 years is unconstitutional. Here the plaintiffs run squarely up against our holding in *Schnapper v. Foley*, 667 F.2d 102, 112 (1981), in which we rejected the argument "that the introductory language of the Copyright Clause constitutes a limit on congressional power." The plaintiffs, however, disclaim any purpose to question the holding of *Schnapper*; indeed, they expressly acknowledge "that the preamble of the Copyright Clause is not a substantive limit on Congress' legislative power." Their argument is simply that "the Supreme Court has interpreted the terms 'Authors' and 'Writings' in light of that preamble, and that this Court should do the same with 'limited Times.' "

The problems with this argument are manifest. First, one cannot concede that the preamble "is not a substantive limit" and yet maintain that it limits the permissible duration of a

copyright more strictly than does the textual requirement that it be for a "limited Time." Second, although the plaintiffs claim that *Feist* supports using the preamble to interpret the rest of the Clause, the Court in *Feist* never suggests that the preamble informs its interpretation of the substantive grant of power to the Congress (which there turned upon the meaning of "Authors" and of "Writings," each standing alone). 499 U.S. at 345-47. Similarly, the *Trade-Mark Cases* cited in *Feist* rest upon the originality implied by "invention [and] discovery" and by the "writings of authors," and make no reference at all to the preamble. 100 U.S. at 93-94.

III. The Dissent

The foregoing suffices to dispose of plaintiffs' arguments—as Judge Sentelle, dissenting, implicitly recognizes—and hence to resolve this case. Our dissenting colleague nonetheless adopts the narrow view of *Schnapper* urged by an amicus, although that argument is rejected by the actual parties to this case and therefore is not properly before us. *See, e.g.*, 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3975.1 & n.3 (3d ed.1999); *Resident Council of Allen Parkway Vill. v. HUD*, 980 F.2d 1043, 1049 (5th Cir. 1993) (amicus constrained "by the rule that [it] generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal"); *cf. Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992) (intervenor as nonparty "cannot expand the proceedings" or "enlarge those issues presented"). This is particularly inappropriate because a court should avoid, not seek out, a constitutional issue the resolution of which is not essential to the disposition of the case before it. Moreover, because the plaintiffs conspicuously failed to adopt the argument of the amicus, the Government was not alerted to any need to argue this point and did not do so. *See Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989) (court must "avoid unnecessary or

premature constitutional rulings" and this concern "is heightened by the absence of meaningful argument by the parties on [constitutional] question"); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'").

Even were we to proceed as urged by the amicus and the dissent, however, we would only review the CTEA as we would any other exercise of a power enumerated in Article I. That is we would ask, following *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), whether the CTEA is a "necessary and proper" exercise of the power conferred upon the Congress by the Copyright Clause; assuming Judge Sentelle is correct and *Schnapper* is wrong about the relationship of the preamble to the rest of that Clause, this would require that the CTEA be an "appropriate" means, and "plainly adapted" to the end prescribed in the preamble, "promot[ing] Progress of Science and useful Arts." The Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration. *See* S. Rep. No. 104-315, at 12 (1996). If called upon to do so, therefore, we might well hold that the application of the CTEA to subsisting copyrights is "plainly adapted" and "appropriate" to "promot[ing] progress." *See Ladd v. Law & Technology Press*, 762 F.2d 809, 812 (9th Cir. 1985) (upholding the deposit requirement of the Copyright Act of 1976 as "necessary and proper" because the purpose was "to enforce contributions of desirable books to the Library of Congress").

Judge Sentelle concludes otherwise only because he sees a categorical distinction between extending the term of a subsisting copyright and extending that of a prospective copyright. This distinction is not to be found in the Constitution itself, however. The dissent identifies nothing in text or

in history that suggests that a term of years for a copyright is not a "limited Time" if it may later be extended for another "limited Time." Instead, the dissent suggests that the Congress—or rather, many successive Congresses—might in effect confer a perpetual copyright by stringing together an unlimited number of "limited Times," although that clearly is not the situation before us. The temporal thrust of the CTEA is a good deal more modest: The Act matches United States copyrights to the terms of copyrights granted by the European Union, *see* Council Directive 93/98, art. 7, 1993 O.J. (L 290) 9; in an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits for the exploitation of copyrights. This is a powerful indication that the CTEA is a "necessary and proper" measure to meet contemporary circumstances rather than a step on the way to making copyrights perpetual; the force of that evidence is hardly diminished because, as the dissent correctly points out, the EU is not bound by the Copyright Clause of our Constitution. As for the dissent's objection that extending a subsisting copyright does nothing to "promote Progress," we think that implies a rather crabbed view of progress: Preserving access to works that would otherwise disappear—not enter the public domain but disappear—"promotes Progress" as surely as does stimulating the creation of new works.

The position of our dissenting colleague is made all the more difficult because the First Congress made the Copyright Act of 1790 applicable to subsisting copyrights arising under the copyright laws of the several states. *See* Act of May 31, 1790,

§§ 1 and 3, 1 Stat. 124-25.[1] The construction of the Constitution "by [those] contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed [for this long], it is almost conclusive." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884). The plaintiffs, recognizing the import of this "almost conclusive" point for their own theory, try to avoid it with the suggestion that application of the Act of 1790 to subsisting copyrights "is fully understandable under a Supremacy Clause analysis" in that it "clarif[ied] which law (state or federal) would govern th[o]se copyrights." But that will not do: A federal law is not valid, let alone supreme, if it is not first an exercise of an enumerated power. And the First Congress was clearly secure in its power under the Copyright Clause to extend the terms of subsisting copyrights beyond those granted by the States.

Such guidance as the Supreme Court has given further confirms us in this view of the matter. The Court has made plain that the same Clause permits the Congress to amplify the terms of an existing patent. As early as 1843 it established that the status of a particular invention and its protections

> must depend on the law as it stood at the emanation of the patent, together with such changes as have been since made; for though they may be retrospective in their operation, that is not a sound objection to their validity; the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, there can be no limitation of their

[1] Indeed, each of the four later Congresses that extended the terms of copyrights followed suit in doing so for subsisting as well as prospective copyrights. *See* Act of Feb. 3, 1831 § 1, 4 Stat. 436-39; Act of March 4, 1909 § 23, 35 Stat. 1075-88; Pub. L. No. 94-553 § 301, 90 Stat. 2541-2602 (1976); Pub. L. No. 105-298, 112 Stat. 2827 (2000).

> right to modify them at their pleasure, so that they do not take away the rights of property in existing patents.

McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843).

Within the realm of copyright, the Court has to the present era been similarly deferential to the judgment of the Congress. "As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the appropriate public access to their work product;" that "task involves a difficult balance between [competing interests]" as reflected in the frequent modifications of the relevant statutes. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). And still more recently: "Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces [in exercising its copyright power]. . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve." *Stewart v. Abend*, 495 U.S. 207, 230 (1990).

IV. Conclusion

In sum, we hold that the CTEA is a proper exercise of the Congress's power under the Copyright Clause. The plaintiffs' first amendment objection fails because they have no cognizable first amendment interest in the copyrighted works of others. Their objection that extending the term of a subsisting copyright violates the requirement of originality misses the mark because originality is by its nature a threshold inquiry relevant to copyrightability, not a continuing concern relevant to the authority of the Congress to extend the term of a copyright.

Whatever wisdom or folly the plaintiffs may see in the particular "limited Times" for which the Congress has set the duration of copyrights, that decision is subject to judicial review only for rationality. This is no less true when the Congress modifies the term of an existing copyright than when it

sets the term initially, and the plaintiffs—as opposed to one of the amici—do not dispute that the CTEA satisfies this standard of review. The question whether the preamble of the Copyright Clause bars the extension of subsisting copyrights—a question to which the analysis in *Schnapper* seems to require a negative answer—may be revisited only by the court sitting *en banc* in a future case in which a party to the litigation argues the point.

For the foregoing reasons, the decision of the district court is

Affirmed.

SENTELLE, Circuit Judge, dissenting in part:

While I concur with much of the majority's opinion, insofar as it holds constitutional the twenty-year or more extension of copyright protection for existing works, I dissent. This issue calls upon us to consider the scope of one of the clauses granting enumerated powers to Congress, specifically, Art. I, § 8, cl. 8:

> Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. . . .

In ascertaining the breadth of an enumerated power, I would follow the lead of the United States Supreme Court in *United States v. Lopez*, 514 U.S. 549, 552 (1995), and "start with first principles." The governing first principle in *Lopez* and in the matter before us is that "[t]he Constitution creates a Federal Government of enumerated powers." 514 U.S. at 552 (citing Art. I, § 8). The Framers of the Constitution adopted the system of limited central government "to ensure the protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotations and citations omitted). The *Lopez* decision, considering the validity of the so-called

Gun-Free School Zones Act, reminded us that "congressional power under the Commerce Clause . . . is subject to outer limits." 514 U.S. at 556-57; *see also United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 1748-49 (2000).

It would seem to me apparent that this concept of "outer limits" to enumerated powers applies not only to the Commerce Clause but to *all* the enumerated powers, including the Copyright Clause, which we consider today. In determining whether the legislation before it in such cases as *Lopez* exceeded the outer limit of the authority granted under the Commerce Clause, the *Lopez* Court laid out a precise outline concededly not applicable by its terms to the construction of other clauses, but I think most useful in conducting the same sort of examination of the outer limits of any enumerated power. As a part of that analysis, the Court examined the extension of congressional authority to areas beyond the core of the enumerated power with a goal of determining whether the rationale offered in support of such an extension has any stopping point or whether it would lead to the regulation of all human activity. *See* 514 U.S. at 564 ("Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."). I fear that the rationale offered by the government for the copyright extension, as accepted by the district court and the majority, leads to such an unlimited view of the copyright power as the Supreme Court rejected with reference to the Commerce Clause in *Lopez*.

What then do I see as the appropriate standard for limiting that power? Again, the *Lopez* decision gives us guidance as to the application of first principles to the determination of the limits of an enumerated power. Citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-190 (1824), the *Lopez* Court acknowledged "that limitations on the commerce power are inherent in the very language of the Commerce Clause." 514 U.S. at 553.

Just so with the Copyright Clause. What does the clause empower the Congress to do?

> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. . . .

That clause empowers the Congress to do one thing, and one thing only. That one thing is "to promote the progress of science and useful arts." How may Congress do that? "By securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The clause is not an open grant of power to secure exclusive rights. It is a grant of a power to promote progress. The means by which that power is to be exercised is certainly the granting of exclusive rights—not an elastic and open-ended use of that means, but only a securing for limited times. *See Stewart v. Abend*, 495 U.S. 207, 228 (1990) ("The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors."). The majority acknowledges that "[i]f the Congress were to make copyright protection permanent, then it surely would exceed the power conferred upon it by the Copyright Clause." Maj. Op. at 377. However, there is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection. The Congress that can extend the protection of an existing work from 100 years to 120 years, can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300; and in effect can accomplish precisely what the majority admits it cannot do directly. This, in my view, exceeds the proper understanding of enumerated powers reflected in the *Lopez* principle of requiring some definable stopping point.

Returning to the language of the clause itself, it is impossible that the Framers of the Constitution contemplated permanent protection, either directly obtained or attained through the

guise of progressive extension of existing copyrights. The power granted by the clause again is the power "to promote the progress of science and useful arts." As stated above, Congress is empowered to accomplish this by securing for limited times exclusive rights. Extending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time.

The government has offered no tenable theory as to how retrospective extension can promote the useful arts. As the Supreme Court noted in *Lopez* and again in *United States v. Morrison*, that Congress concluded a given piece of legislation serves a constitutional purpose "does not necessarily make it so." *Lopez*, 514 U.S. at 557 n.2 (internal quotes omitted); *Morrison*, 120 S. Ct. at 1752. Pressed at oral argument, counsel for the government referred to keeping the promise made in the original grant of exclusivity for a limited time. The easy answer to this assertion is that Congress is not empowered to "make or keep promises" but only to do those things enumerated in Article I. The second problem with the government's assertion is that Congress made no promise to commit such an extension but only to secure the exclusive rights for the original limited period. Thirdly, the means employed by Congress here are not the securing of the exclusive rights for a limited period, but rather are a different animal altogether: the extension of exclusivity previously secured. This is not within the means authorized by the Copyright Clause, and it is not constitutional.

The majority responds to this problem of the statute's exceeding the constitutional grant by reliance on *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), "in which we rejected the argument 'that the introductory language of the Copyright Clause constitutes a limit on congressional power.'" Maj. Op. at 378 (quoting 667 F.2d at 112). I will concede that it does not matter if I disagree with the language of *Schnapper* (which in fact I do) as it is our Circuit precedent and we are bound by its holding unless and until that holding is changed by this court

en banc or by the higher authority of the Supreme Court. *See, e.g., LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) ("One three-judge panel . . . does not have the authority to overrule another three judge panel of the court. That power may be exercised only by the full court." (citations omitted)); *United States v. Kolter*, 71 F.3d 425, 431 (D.C. Cir. 1995) ("This panel would be bound by [a prior] decision even if we did not agree with it.").

Therefore, it is immaterial that the prior opinion is, in my view, erroneous in styling the granting clause of the sentence as merely introductory when in fact it is the definition of the power bestowed by that clause. Thus, unless and until this precedent is wiped away, if *Schnapper* has held that we may not look to the language of this phrase to determine the limitations of the clause then I must concede that we are bound by that holding and join the majority's result. However, it does not appear to me that this is the holding of *Schnapper*. The *Schnapper* Court dealt with limited questions related to the application of the copyright laws to works commissioned by the U.S. government. In answering those questions, the *Schnapper* Court held that "Congress need not 'require that each copyrighted work be shown to promote the useful arts.' "667 F.2d at 112 (quoting *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979)). It was in that context that the *Schnapper* Court employed the wording relied upon by the majority concerning the "introductory language" of the Copyright Clause. Insofar as that wording is taken to be anything more than the determination concerning that limited analysis, it is not a holding but simply *dicta* (perhaps *obiter dicta)* and not binding on future panels.

Rather, the *Schnapper* analysis again takes us back to the *Lopez* approach to judicial interpretation of the enumerated powers clauses. In *Lopez*, one of the means employed to determine the constitutionality of extended application of the Commerce Clause is an elemental inquiry into whether in each

case the purportedly regulated action "in question affects interstate commerce." 514 U.S. at 561. However, the jurisdictional element is not necessary under *Lopez* analysis of Commerce Clause regulation where Congress is directly regulating "the use of the channels of interstate commerce" or "persons or things in interstate commerce." *Id.* at 558. Similarly, I suggest that in analyzing the extent of congressional power under the Copyright Clause, the *Schnapper* holding that each individual application of copyright protection need not promote the progress of science and the useful arts does not mean that Congress's power is otherwise unlimited, anymore than the lack of a necessity for case-by-case analysis of the effect on interstate commerce validates anything Congress may wish to do under the rubric of the Commerce Clause. Though, under *Schnapper*, we may not require that each use of a copyright protection promote science and the arts, we can require that the exercise of power under which those applications occur meet the language of the clause which grants the Congress the power to enact the statute in the first place. This the extension does not do. It is not within the enumerated power.

The majority suggests that my reading of *Schnapper* is somehow foreclosed by the fact that it accepts the argument of an amicus. *See* Maj. Op. at 378 (citing 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3975.1 & n.3 (3d ed.1999); *Resident Council of Allen Parkway Vill. v. HUD*, 980 F.2d 1043, 1049 (5th Cir. 1993)). The disposition I suggest would offend nothing in either Professor Wright's treatise or the cases aligned with it. Neither I nor the amicus raise any issue not raised by the parties to the case, nor disposed of by a majority of the court. Appellants raise the issue "whether . . . the Copyright Clause of the Constitution of the United States constrains the Congress from extending for a period of years the duration of copyrights, both those *already extant* and those yet to come." Maj. Op. at 373 (emphasis added). The majority addresses that issue and holds

against the appellant. Maj. Op. at 380 ("we hold that the CTEA is a proper exercise of the Congress's power under the Copyright Clause"). That the amicus argues more convincingly in appellants' favor on the issue raised by the appellants than they do themselves is no reason to reject the argument of the amicus. Indeed, our Circuit Rules provide that an amicus brief "must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court." Circuit Rule 29. Obviously that is precisely what the amicus has done in this case.

Resident Council of Allen Parkway Village, relied on by the majority, highlights this difference between introducing issues not raised by the parties on the one hand and making new arguments for issues otherwise properly raised on the other. As the Fifth Circuit noted in that case, "[w]e are constrained only by the rule that an amicus curiae generally cannot expand the scope of an appeal to implicate *issues* that have not been presented by the parties to the appeal." 980 F.2d at 1049 (emphasis added).

Our Circuit Rule and the Fifth Circuit are in good company in allowing amici to make additional arguments that address issues which the parties have raised but not argued in the same fashion. The Supreme Court has approved precisely that approach. In *Teague v. Lane*, 489 U.S. 288 (1989), that Court considered a question of retroactivity as to a fair cross section jury venire in a case also raising a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court noted that "[t]he question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an *amicus* brief." 489 U.S. at 300. Noting that the "question is not foreign to the parties, who have addressed retroactivity with respect to petitioner's *Batson* claim," *id.*, the Court proceeded to address the merits of the argument.

Nor are we constrained by the parties' apparent agreement as to the state of the law under *Schnapper*. The Supreme Court has made it clear that we cannot be bound by stipulations of law between the parties, where there is "a real case and controversy extending to that issue." *United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993). As the High Court put it, "'[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'" *Id.* (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)).

I find two other arguments the majority invokes against my dissent unpersuasive. The enactment by the first Congress in 1790 regularizing the state of copyright law with respect to works protected by state acts preexisting the Constitution appears to me to be *sui generis*. Necessarily, something had to be done to begin the operation of federal law under the new federal Constitution. The Act of May 31, 1790, 1 Stat. 124, created the first (and for many decades only) federal copyright protection; it did not *extend* subsisting *federal* copyrights enacted pursuant to the Constitution. *Cf. Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834) ("Congress, then, by this [copyright] act, instead of sanctioning an existing right, as contended for, created it."). The fact that the CTEA "matches United States copyrights to the terms of copyrights granted by the European Union," Maj. Op. at 379 (citing Council Directive 93/98, art. 7, 1993 O.J. (L 290) 9), is immaterial to the question. Neither the European Union nor its constituent nation states are bound by the Constitution of the United States. That Union may have all sorts of laws about copyrights or any other subject which are beyond the power of our constitutionally defined central government.

Therefore, I respectfully dissent.

255 F.3d 849

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Eric ELDRED, et al., Appellants,
v.
John ASHCROFT, In his official capacity as Attorney General, Appellee.

No. 99-5430.

Filed July 13, 2001.

On Petition for Rehearing.

Before: GINSBURG, SENTELLE and HENDERSON, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.[1]

GINSBURG, Circuit Judge:

The plaintiffs-appellants in this case, corporations, associations, and individuals who rely for their vocations and avocations upon works in the public domain, have petitioned for rehearing and filed a suggestion for rehearing en banc. They renew their contentions that the Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827, violates both the First Amendment and the Copyright Clause of the Constitution of the United States.

The plaintiffs-appellants further complain that this court erred in its treatment of the contentions advanced by one of the amici. We are not persuaded. The district court's rejection of the plaintiffs-appellants' constitutional attack followed from its

[1] Circuit Judge SENTELLE dissents from the denial of rehearing.

conclusion, in the light of our decision in *Schnapper v. Foley*, 667 F.2d 102, 112 (1981), that "[t]he introductory language of the copyright clause does not limit [the Congress's] power." Upon appeal, the plaintiffs-appellants did not challenge that determination; rather, they maintained only that the substantive grant of power in the Copyright Clause—authorizing the Congress to grant copyrights for "limited Times"—does not authorize the Congress to extend the terms of copyrights as it did in the CTEA. In sharp contrast, an amicus contended that the CTEA violates the preamble to the Copyright Clause because extending the term of a subsisting copyright does not "promote the Progress of Science and useful Arts."

As we stated in Part III of our opinion, 239 F.3d 372, 378 (2001), the court deems it "particularly inappropriate" in this case to reach the merits of the amicus's position. To elaborate: First, in their brief the plaintiffs-appellants themselves took the position, diametrically opposed to that of the amicus, "that the preamble of the Copyright Clause is not a substantive limit on Congress' legislative power"; when expressly offered the opportunity at oral argument to adopt the position of the amicus, the plaintiffs-appellants did not do so. Therefore, even if we were to read the plaintiffs-appellants' brief broadly as raising the issue whether the Copyright Clause as a whole—including both the preamble and the grant of authority—renders the CTEA unconstitutional, following the lead of the Supreme Court we would still not reach what would then be the supporting argument of the amicus. *See New Jersey v. New York*, 523 U.S. 767, 781 n.3 (1998) (although arguments of amici and party stem from same article of compact, court "must pass over the arguments of the named *amici* for the reason that . . . the party to the case[ ] has in effect renounced them, or at least any benefit they might provide"); *see also Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1367 (D.C. Cir. 1999) (remanding where the parties "request[ed] us to remand to the district court for consideration of [legal] issue," whereas "the amicus'

prefer[red] that we resolve it" ourselves, which we could readily have done); *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998) ("Because we ordinarily do not entertain arguments not raised by parties . . . we consider only the [party's] equal protection challenge" where amicus filed brief "supporting [party's] equal protection claim and reiterating its separation of powers and bill of attainder arguments"); *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (court ordinarily "would not entertain an *amicus'* argument if not presented by a party").

Second, the point advanced by the amicus—that the preamble of the Copyright Clause is a substantive limitation upon the power of the Congress—implicates discrete terms of the Clause that are not otherwise at issue. In that sense it poses an additional constitutional question, subject to the "rule of avoidance"; and there can hardly be a better reason to avoid a constitutional question than that the parties are in agreement. *See, e.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it' ").

Third, because the plaintiffs-appellants did not take the same tack as the amicus, the Government did not on brief address the district court's interpretation of this court's decision in *Schnapper*. *See New Jersey v. New York*, 523 U.S. at 781 n.3. Therefore, our usual concern with "avoid[ing] unnecessary or premature constitutional rulings," here as in *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989), "is heightened by the absence of meaningful argument by the parties on this question."

Finally, as explained in Part III of the opinion, *id.* at 378-80, even if we considered the amicus's position we would not reach a different result in this case: Regardless whether, as the amicus contends, the preamble limits the power of the Congress, the CTEA still passes muster under the "necessary

and proper review" applicable to the Congress's "exercise of a power enumerated in Article I." 239 F.3d at 378. The Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration. *Id.* at 379. "Preserving access to works that would otherwise disappear—not enter the public domain but disappear—'promotes Progress' as surely as does stimulating the creation of new works." *Id.*

We reject the plaintiffs-appellants' challenge under the First Amendment for the reasons stated in the prior opinion. Accordingly, the petition for rehearing is

Denied.

BEFORE: EDWARDS, Chief Judge, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND, Circuit Judges.

ORDER

PER CURIAM

Appellants' petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

A statement of Circuit Judge SENTELLE, joined by Circuit Judge TATEL, dissenting from the denial of rehearing en banc is attached.

SENTELLE, Circuit Judge, *dissenting from the denial of rehearing en banc,* with whom Circuit Judge TATEL joins:

In my view, the decision in this case is not only incorrect, but is worthy of en banc review on both circuit-specific procedural grounds and fundamental constitutional grounds.

First, procedurally, the Court's opinion in this case effectively eliminates any role for *amicus curiae* in the practice of this circuit, when it holds that an argument raised by an *amicus* may not be considered by the Court. *See Eldred v. Reno,* 239 F.3d 372, 378 (D.C. Cir. 2001). There is no dispute that an *amicus curiae* may not raise new *issues* in an appeal. Rather, the role of an *amicus* is to assist the court in addressing the issues already raised with new arguments and perspectives. In this case, the *issue* before the Court was, in the panel's words, "whether . . . the Copyright Clause of the Constitution of the United States constrains the Congress from extending for a period of years the duration of copyrights, both those already extant and those yet to come." *Eldred,* 239 F.3d at 373. The *amicus* brief submitted on behalf of Eagle Forum addressed this issue more persuasively than did appellants. But *amicus* did not "expand the scope" of the appeal by "implicat[ing] issues" not raised by the appellant. *See Resident Council of Allen Parkway Vill. v. HUD,* 980 F.2d 1043, 1049 (5th Cir.1993) ("We are constrained *only* by the rule that an amicus curiae generally cannot expand the scope of an appeal to implicate *issues* that have not been presented by the parties to the appeal." (emphases added)). Rather, as the majority noted, *amicus* adopted a different "argument." *Eldred,* 239 F.3d at 378. A new "argument" is not a new "issue." This is clear from our circuit's rules. Specifically, an *amicus* brief "must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court." Circuit Rule 29. The role of *amici* is to help in this

process, by elaborating upon arguments made by the parties *and* presenting arguments of their own that bear upon the issues raised by the parties themselves. *See White v. Illinois,* 502 U.S. 346, 352 (1992) ("We consider as a preliminary matter an argument not considered below but urged by the United States as *amicus curiae* in support of respondent.").

"When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 99 (1991); *see also United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am. Inc.,* 508 U.S. 439, 446 (1993) (same). Merely because the parties fail to advance the proper legal theory underlying their claim does not—indeed cannot—prevent a court from arriving at the proper legal disposition. Once the issue is raised, a court has an obligation to determine what the law is which will govern the case at hand. This is so irrespective of whether *amici curiae* enter an appearance. As it happened, Eagle Forum submitted an *amicus curiae* brief augmenting appellants' position by making a different argument on the issue before the Court, and at least one member of the panel found it persuasive. Even if the majority did not find *amicus's* argument compelling, it was properly before the Court.

The majority holds that the "argument" raised by one *amicus* was "not properly before" this Court because it was effectively renounced by appellants. *Eldred,* 239 F.3d at 378. This claim is not supported by the record. The relevant *amicus* brief was submitted some two weeks *after* appellants' opening brief. Insofar as the oral argument transcript shows anything at all, it illustrates that appellants had not explicitly adopted *amicus's*

arguments in brief but had no problem taking advantage of *amicus's* argument.[2]

The language of *New Jersey v. New York*, 523 U.S. 767, 781 n.3 (1998), might be taken to suggest that a court must "pass over . . . arguments" raised only by an *amicus*, but I believe that this is a misreading of the case. In *New Jersey*, the Court noted that only *amici* took issue with the special master's conclusion affirming the Court's prior holding that "the 'boundary line' between the States established in Article First [of the Interstate Compact]" was the line of sovereignty between the states. *Id.* at 781. In other words, the *amici*, and only the *amici*, sought to overturn Supreme Court precedent. Additionally, insofar as the *amici* sought to make an exception to the special master's finding with regard to Article First of the compact, it sought to obtain the Court's judgment about a matter about which there was no present controversy. *See United States v. Louisiana*, 446 U.S. 253, 260-61 (special master's recommendation not subject to exception by either party accepted by Court due to lack of "present controversy"), *reh'g denied*, 447 U.S. 930 (1980). Thus, even though the Court used the word "argument" to characterize the claims put forward by *amici*, they were raising issues beyond the purview of the case before the Court.

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[2] The relevant portion of the transcript reads as follows:

> THE COURT: Have you adopted any point—any arguments that appear in any of these amicus briefs? Or maybe—I don't remember—there is more than one, but in any brief other than your own? LESSIG: Well, in particular, Mr. Jaffe's brief is a brief that makes textualist arguments that we believe are quite strong in this way.
>
> THE COURT: Is there any place in which you have adopted them, in your briefs?
>
> LESSIG: We formally acknowledge them in our briefs. I don't believe we have, Your Honor, no.

Contrary to the suggestion of the panel majority, appellants' argument did implicate the "preamble" of the Copyright Clause, just not in the same fashion as *amicus*. Appellants stipulated to the reading postulated by the district court, as the panel majority notes. Appellants' Opening Brief at 29 n.15. Yet in the very footnote cited by the panel majority, appellants claimed that the remaining portions of the Copyright Clause must be read "in light of th[e] preamble." *Id.* Contrary to my colleagues' suggestion, this Court was not asked to "anticipate" a question of constitutional law, but to decide a very discreet question—whether the CTEA exceeds the grant of power in the Copyright Clause. Whether appellants asked this Court to recognize that the so-called "preamble" is in fact the enumerated power, or merely to read the rest of the clause "in light of that preamble" should be immaterial. Indeed, the Supreme Court noted long ago that the words of the Copyright Clause should be read "with the words and sentences with which it stands connected." *Wheaton v. Peters*, 33 U.S. (8 Peters) 591, 661 (1834); *see also Postmaster-General v. Early*, 25 U.S. (12 Wheat.) 136, 152 (1827) (it is a "cardinal rule of construction" that "the whole law is to be taken together, and one part expounded by any other which may indicate the meaning annexed . . . to ambiguous phrases").

Under the panel's holding, it is now the law of this circuit that *amici* are precluded *both* from raising new issues *and* from raising new arguments. If allowed to stand, this holding will effectively bar future *amici* from adding anything except possibly rhetorical flourish to arguments already outlined and embraced by the parties. This is particularly the case for those *amici* who, true to their traditional role as "friends of the court," operate independently to assist the Court in its determinations. If this Court is to adopt such a rule—and I hope we do not—we should do so sitting en banc, not by a divided panel.

Second, and more importantly, the Court's construction of the Copyright Clause of the Constitution renders Congress's power under Art. I, § 8, cl. 8, limitless despite express limitations in the terms of that clause. The clause grants to Congress the "power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries. . . ." Under the Court's decision herein, Congress may at or before the end of each such "limited period" enact a new extension, apparently without limitation. As the majority conceded, "[i]f the Congress were to make copyright protection permanent, then it surely would exceed the power conferred upon it by the Copyright Clause." *Eldred*, 239 F.3d at 377. The majority never explained how a precedent that would permit the perpetuation of protection in increments is somehow more constitutional than one which did it in one fell swoop. As the majority noted in describing my panel dissent, "Judge Sentelle . . . sees a categorical distinction between extending the term of a subsisting copyright and extending that of a prospective copyright." *Id.* at 379, 239 F.3d 372. Indeed I do. Establishing the term of a prospective copyright is not an extension, nor does it in itself implicate the authority of Congress to incrementally create perpetual exclusivity.

Contrary to my colleagues, I do not accept that it is sufficient for Congress to merely articulate some hypothetical basis to justify the claimed exercise of an enumerated power. The Copyright Clause only bestows the power 'to promote the progress of science and useful arts." In exercising this power, Congress "may not overreach the restraints imposed by the stated constitutional purpose," which is "the promotion of advances in the 'useful arts.'" *Graham v. John Deere Co.*, 383 U.S. 1, 5, 6 (1966). I accept that extending copyright terms for future works may well increase creative efforts at the margin. Once a work is published, however, extending the copyright term does absolutely nothing to induce further creative activity by the author—and how could it? The work

is already published. A simple finding by Congress to the contrary is not sufficient to demonstrate that the exercise of that power is "necessary and proper." As the Supreme Court noted in *Lopez* and again in *Morrison*, that Congress concluded a given piece of legislation serves a Constitutional purpose "does not necessarily make it so." *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (citation omitted); *United States v. Morrison*, 529 U.S. 598 (2000).

The panel concluded—wrongly in my view, *see Eldred*, 239 F.3d at 382-83 (Sentelle, J., dissenting)—that my interpretation of the Copyright Clause is precluded by *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), which appeared to reject any meaningful limit on the scope of the copyright power. This interpretation of *Schnapper* erases from Article I half of the Copyright Clause—indeed, that half which defines the very power bestowed. If *Schnapper* indeed precludes a panel of this Court from applying the Constitution as written, then we have yet one more reason to consider this case en banc.

The majority opinion in this case dramatically narrowed the role of *amici* before this Court and, in my view, effectively erased portions of the Copyright Clause of the Constitution. Though I believe that this Court should grant en banc review quite sparingly, either issue individually merits en banc review. Because this case presents both questions, it is particularly worthy of the full Court's attention.

74 F. Supp. 2d 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

Eric ELDRED, et al., Plaintiffs,
v.
Janet RENO, In her official capacity as Attorney General of the United States, Defendant.

No. 99-0065 (JLG).

Oct. 28, 1999.

MEMORANDUM

JUNE L. GREEN, District Judge.

Before the Court are the parties' cross-motions for Judgement on the Pleadings pursuant to Fed. R. Civ. P. 12(c), and the responses and replies thereto.[1] Pursuant to 28 U.S.C. § 2201 the Plaintiffs seek a declaratory judgment that Section 102(d)(1)(B) of the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 ("CTEA"), amending 17 U.S.C. § 304(b), is unconstitutional.[2]

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[1] *Amici Curiae* filed briefs in support of the Defendant.

[2] They also seek, upon the courts finding that the CTEA is unconstitutional, a preliminary and permanent injunctive relief against the criminal enforcement of Section 2(b) of the No Electronic Theft Act of 1997, with respect to works that would not have a valid copyright but for the enactment of Section 102(d)(1)(B) of the CTEA. *See* Publ. L. No. 105-147, 111 Stat. 2678 ("Net Act"), amending 17 U.S.C. § 506(a). As the court denies the declaratory judgment, it also denies the injunctive relief requested.

For the reasons that follow, the court concludes that the CTEA is not unconstitutional. Accordingly, the Court denies the declaratory judgment requested. As explained more fully below, the Defendant's motion for Judgment on the Pleadings is granted.

I. BACKGROUND

The Plaintiffs are Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus Co., American Film Heritage Association, Moviecraft, Inc., Dover Publications, Inc., and Copyright's Commons. They allege that they each use, copy, reprint, perform, enhance, restore or sell works of art, film, or literature in the public domain. (Second Am. Compl. at 4.) They further allege that they prepared to use in some way works created before 1923 and but for the CTEA they could have legally copied, distributed, or performed these works that would otherwise have entered the public domain. (Second Am. Compl. at 4.)[3]

The Constitution provides that Congress has the power "[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nvestors the exclusive [r]ight to theirrespective [w]ritings and [d]iscoveries." U.S. Const. art. I, § 8, cl. 8. In 1970, pursuant to this power, Congress enacted a federal copyright statute

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[3] The Defendant does not deny these allegations or raise standing in any filing. (Ans. Second Am. Compl. at 2.) Unless the Plaintiffs' allegation that they prepared to use these works in some way is untrue, the Plaintiffs have constitutional standing as the enactment of the CTEA allegedly caused an injury in fact to their ability to use these works that is redressable by declaratory judgment. *See, e.g., Federal Election Commission v. Akins*, 524 U.S. 11 (1998).

providing for exclusive rights for limited times.[4] Since then, Congress revised and extended these exclusive rights for limited times.[5]

The latest revision and extension, the CTEA, became law on October 27, 1998. Sonny Bono Copyright Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827. The CTEA provides for exclusive rights for the life of the author plus 70 years (or for certain works, if the life of the author cannot be ascertained, for 95 years after publication or 120 years after the creation of the work, whichever is shorter). These rights apply to works created on or after January 1, 1978, and works created before then with existing rights subsisting in a renewal term provided by the Copyright Act of 1976.

Plaintiffs allege that the CTEA violates the first amendment. Pls' Mem. at 35-58, 69-87.

They also allege that the retrospective extension of copyright protections beyond Congress's enumerated power under the copyright clause and violates the public interest doctrine. Pls.' Mem. at 23-35, 58-69.

II. Analysis

A. First Amendment Rights

The Plaintiffs' first claim, that the CTEA violates the First Amendment, is not supported by relevant case law. Pls.' Mem.

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[4] The original statute provided a copyright for fourteen years and additional fourteen years if the author was living U.S. citizen. Act of May 31, 1790, §§ 1 and 3, 1 Stat. 124-25.

[5] *See* Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436; Act of March 4, 1909; ch. 320 § 23, 35 Stat. 1075, 1080; Act of Oct. 19, 1976, §§ 302, 303, Pub. L. No. 94-553, 90 Stat. 2598; see also Pub. L. No. 87-668 (1962); Pub. L. No. 89-142 (1965); Pub. L. No. 90-141 (1967); Pub. L. No. 90-416 (1968); Pub. L. No. 91-147 (1969); Pub. L. No. 92-170 (1971); Pub. L. No. 92-566 (1972); Pub. L. No. 93-573 (1974).

at 35-58, 69-87. The District of Columbia Circuit has ruled definitively that there are no First Amendment rights to use the copyrighted works of others. *United Video v. F.C.C.*, 890 F.2d 1173, 1191 (D.C. Cir. 1989); *see Harper & Row, Publishers, Inc. v. National Enterprises*, 471 U.S. 539, 556 (1985). Therefore, the Court rejects Plaintiffs' First Amendment claim.

B. Retrospective Extension

1. Enumerated Power

The Plaintiffs next allege that the retrospective extension of copyright protection is beyond Congress's enumerate power under the copyright clause. Pls.' Mem. at 23-35. They allege that the retrospective extension violates the "[l]imted [t]imes" and the "to [a]uthors" terms of the copyright clause. Pls.' Mem. at 23-28.

First, they allege that by changing, on several occasions, the limited times for some copyright grants, the Defendant violated the 'l]imited [t]imes" clause. Pls.' Mem. at 28-33. The Supreme Court has held that Congress defines the scope of the grant of copyrights to authors or to inventors under its copyright clause power.[6] *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). The "[l]imited [t]imes" period is "subject to discretion of Congress." *Pennock & Sellers v. Dialogue*, 27 U.S. (2 Pet.) 1, 16-17 (1829). Moreover, Congress has authority to enact retrospective laws under the copyright clause[7] *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843). In light of

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[6] The introductory language of the copyright clause does not limit this power. *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981).

[7] Within the discretion of Congress, any fixed term is a limited time because it is not perpetual. If a limited time is extended for a limited time then it remains a limited time.

these decisions, the Court concludes that the CTEA's extension of limited times is within the discretion of Congress.

Second the Plaintiffs allege that the retrospective extension violates the "to [a]uthors" term of the copyright clause.[8] Pls.' Mem. At 33-35. Under the CTEA, if, prior to its enactment, the author agreed in advance to assign rights under the CTEA's extended term, then such an agreement is given effect because there is no contrary presumption that the grant of extended term not be so assigned. 17 U.S.C. §§ 203, 304(c) and 304(d) Although the Plaintiffs allege that the absence of such a presumption violates the "to [a]uthors" term, it does not. The author may agree to transfer his or her exclusive rights to a third party only for a limited period or, alternatively, subject to any applicable statutory termination right, the author may agree in advance (before a renewal period or term extension commences) to transfer or assign future copyrights conferred upon that author by Congress. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

2. Public Trust Doctrine

Lastly, Plaintiffs allege that the retroactive extension of copyright protection violates the public trust doctrine. Pls.' Mem. at 58-69. Under the doctrine, the states hold title to navigable and tidal waters within their boundaries in trust for their people. *See, e.g., Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-81 (1988); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1082-83 (D.C. Cir. 1984). Insofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine.

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[8] Congress has the power "[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]riting and [d]iscoveries." U.S. Const. art. I, § 8, cl. 8.

III. CONCLUSION

For reason set forth above, the Defendant's motion for Judgment on the Pleadings, pursuant to Fed. R. Civ. P. 12(c) is granted. An appropriate Order accompanies this Memorandum.

ORDER

Upon consideration of the parties cross-motions for Judgment on the Pleadings under Fed. R. Civ. P. 12(c), the responses and replies thereto, and for the reasons stated in the accompanying memorandum of law, it is by the Court this 27th day of October 1999,

ORDERED that the Plaintiffs' motion for Judgment on the Pleadings is DENIED; it is further

ORDERED that the Defendant's motion for Judgment on the Pleadings is **GRANTED**.

17 U.S.C. § 302

UNITED STATES CODE ANNOTATED
TITLE 17. COPYRIGHTS
CHAPTER 3—DURATION OF COPYRIGHT

§ 302. Duration of copyright: Works created on or after January 1, 1978

(a) In General.—Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

(b) Joint Works.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

(c) Anonymous Works, Pseudonymous Works, and Works Made for Hire.—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of

that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

(d) Records Relating to Death of Authors.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of that person's interest, and the source of the information recorded, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent the Register considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) Presumption as to Author's Death.—After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefit of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this pre-sumption shall be a complete defense to any action for infringement under this title.

76 Stat. 555
Public Law 87-668
September 19, 1962
[H.J. Res. 627]

JOINT RESOLUTION

Extending the duration of copyright protection in certain cases.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case in which the renewal term of copyright subsisting in any work on the date of approval of this resolution would expire prior to December 31, 1965, such term is hereby continued until December 31, 1965.

Approved September 19, 1962.

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79 Stat. 581
Public Law 89-142
August 28, 1965
[H.J. Res. 431]

JOINT RESOLUTION

Extending the duration of copyright protection in certain cases.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case in which the renewal term of copyright subsisting in any work on the date of approval of this resolution, or the term thereof as extended by Public Law 87-668, would expire prior to December 31, 1967, such term is hereby continued until December 31, 1967.

Approved August 28, 1965.

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81 Stat. 464
Public Law 90-141
November 16, 1967
[S.J. Res. 114]

JOINT RESOLUTION

Extending the duration of copyright protection in certain cases.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case in which the renewal term of copyright subsisting in any work on the date of approval of this resolution, or the term thereof as extended by Public Law 87-668, or by Public Law 89-142 (or by either or bother of said laws), would expire prior to December 31, 1968, such term is hereby continued until December 31, 1968.

Approved November 16, 1967.

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82 Stat. 397
Public Law 90-416
July 23, 1968
[S.J. Res. 172]

JOINT RESOLUTION

Extending the duration of copyright protection in certain cases.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case in which the renewal term of copyright subsisting in any work on the date of approval of this resolution, or the term thereof as extended by Public Law 87-668, by Public Law 89-

142, or by Public Law 90-141 (or by all or certain of said laws), would expire prior to December 31, 1969, such term is hereby continued until December 31, 1969.

Approved July 23, 1968.

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83 Stat. 360
Public Law 91-147
December 16, 1969
[S. J. Res. 143]

JOINT RESOLUTION

Extending the duration of copyright protection in certain cases.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case in which the renewal term of copyright subsisting in any work on the date of approval of this resolution, or the term thereof as extended by Public Law 87-668, by Public Law 89-142, by Public Law 90-141, or by Public Law 90-416 (or by all or certain of said laws), would expire prior to December 31, 1970, such term is hereby continued until December 31, 1970.

Approved December 16, 1969.

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85 Stat. 490
Public Law 92-170
November 24, 1971
[S. J. Res. 132]

JOINT RESOLUTION

Extending the duration of copyright protection in certain cases.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in any

case in which the renewal term of copyright subsisting in any work on the date of approval of this resolution, or the term thereof as extended by Public Law 87-668, by Public Law 89-142, by Public Law 90-141, by Public Law 90-416, by Public Law 91-147, or by Public Law 91-555 (or by all or certain of said laws), would expire prior to December 31, 1972, such term is hereby continued until December 31, 1972.

Approved November 24, 1971.

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86 Stat. 1181
Public Law 92-566
October 25, 1972
[S. J. Res. 247]

JOINT RESOLUTION

Extending the duration of copyright protection in certain cases.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case in which the renewal term of copyright subsisting in any work on the date of approval of this resolution, or the term thereof as extended by Public Law 87-668, by Public Law 89-142, by Public Law 90-141, by Public Law 90-416, by Public Law 91-147, by Public Law 91-555, or by Public Law 92-170 (or by all or certain said laws), would expire prior to December 31, 1974, such term is hereby continued until December 31, 1974.

Approved October 25, 1972

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84 Stat. 1141
Public Law 91-555
December 17, 1970
[S.J. Res. 230]

JOINT RESOLUTION

Extending the duration of copyright protection in certain cases.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in any case in which the renewal term of copyright subsisting in any work on the date of approval of this resolution, or the term thereof as extended by Public Law 87-668, by Public Law 89-442, by Public Law 90-141, by Public Law 90-416, or by Public Law 91-147 (or by all or certain of said laws), would expire prior to December 31, 1971, such term is hereby continued until December 31, 1971.

Approved December 17, 1970.

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88 Stat. 1873 1873
Public Law 93-573
December 31, 1974

An Act to amend Title 17 of the United States Code to remove the expiration date for a limited copyright in sound recordings, to increase the criminal penalties for piracy and counterfeiting of sound recordings, to extend the duration of copyright protection in certain cases, to establish a national commission on new technological uses of copyrighted works, and for other purposes.

TITLE I—AMEND TITLE 17 UNITED STATES CODE, AND FOR OTHER PURPOSES

* * *

SEC. 104. In any case in which the renewal term of copyright subsisting in any work on the date of approval of this Bill, or the term thereof as extended by Public Law 87-668, by Public Law 89-142, by Public Law 90-141, by Public Law 90-416, by Public Law 91-147, by Public Law 91-555, by Public Law 92-170, or by Public Law 92-566 (17 USC 24 Note) (or by all or certain of said laws), would expire prior to December 31, 1976, such term is hereby continued until December 31, 1976.

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90 Stat. 2541 2541
Public Law 94-553
October 19, 1976

An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

* * *

Chapter 3.—DURATION OF COPYRIGHT

Sec. 302. (17 USC 302.) Duration of copyright: Works created on or after January 1, 1978

(a) In General.—Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.

(b) Joint Works.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and fifty years after such last surviving author's death.

(c) Anonymous Works, Pseudonymous Works, and Works Made for Hire.—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any

person having an interest in the copy right in any anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

Sec. 303. (17 USC 303.) Duration of copyright: Works created but not published or copyrighted before January 1, 1978

Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

Sec. 304. (17 USC 304.) Duration of copyright: Subsisting copyrights

(a) Copyrights in Their First Term on January 1, 1978.—Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for twenty-eight years from the date it was originally secured: Provided, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of forty-seven years when application for such renewal and extension shall have been made to the copyright Office and duly registered therein within one year

prior to the expiration of the original term of copyright: And provided further, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his or her next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

(b) Copyrights in Their Renewal Term or Registered for Renewal Before January 1, 1978.—The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured. (c) Termination of Transfers and Licenses Covering Extended Renewal Term.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by the second proviso of subsection (a) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who expected it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grand children as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning

his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may

be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

Public Law 105-298
October 27, 1998

COPYRIGHTS—TERM EXTENSION AND MUSIC LICENSING EXEMPTION .

An Act to amend the provisions of title 17, United States Code, with respect to the duration of copyright, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—COPYRIGHT TERM EXTENSION

Sec. 101

SEC. 101. SHORT TITLE.

This title may be referred to as the "Sonny Bono Copyright Term Extension Act".

Sec. 102 DURATION OF COPYRIGHT PROVISIONS.

(a) PREEMPTION WITH RESPECT TO OTHER LAWS.—Section 301(c) of title 17, United States Code, is amended by striking "February 15, 2047" each place it appears and inserting "February 15, 2067".

(b) DURATION OF COPYRIGHT: WORKS CREATED ON OR AFTER JANUARY 1, 1978.— Section 302 of title 17, United States Code, is amended—

(1) in subsection (a) by striking "fifty" and inserting "70";

(2) in subsection (b) by striking "fifty" and inserting "70";

(3) in subsection (c) in the first sentence—

(A) by striking "seventy-five" and inserting "95"; and

(B) by striking "one hundred" and inserting "120"; and

(4) in subsection (e) in the first sentence—

(A) by striking "seventy-five" and inserting "95";

(B) by striking "one hundred" and inserting "120"; and

(C) by striking "fifty" each place it appears and inserting "70".

(c) DURATION OF COPYRIGHT: WORKS CREATED BUT NOT PUBLISHED OR COPYRIGHTED BEFORE JANUARY 1, 1978.—Section 303 of title 17, United States Code, is amended in the second sentence by striking "December 31, 2027" and inserting "December 31, 2047".

(d) DURATION OF COPYRIGHT: SUBSISTING COPYRIGHTS.—

(1) IN GENERAL.—Section 304 of title 17, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (1)—

(I) in subparagraph (B) by striking "47" and inserting "67"; and

(II) in subparagraph (C) by striking "47" and inserting "67";

(ii) in paragraph (2)—

(I) in subparagraph (A) by striking "47" and inserting "67"; and

(II) in subparagraph (B) by striking "47" and inserting "67"; and

(iii) in paragraph (3)—

(I) in subparagraph (A)(i) by striking "47" and inserting "67"; and

(II) in subparagraph (B) by striking "47" and inserting "67";

(B) by amending subsection (b) to read as follows:

"(b) COPYRIGHTS IN THEIR RENEWAL TERM AT THE TIME OF THE EFFECTIVE DATE OF THE SONNY BONO COPYRIGHT TERM EXTENSION ACT.—Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.";

(C) in subsection (c)(4)(A) in the first sentence by inserting "or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2)," after "specified by clause (3) of this subsection,"; and

(D) by adding at the end the following new subsection:

"(d) TERMINATION RIGHTS PROVIDED IN SUBSECTION (c) WHICH HAVE EXPIRED ON OR BEFORE THE EFFECTIVE DATE OF THE SONNY BONO COPYRIGHT TERM EXTENSION ACT.—In the case of any

copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Sonny Bono Copyright Term Extension Act for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

"(1) The conditions specified in subsections (c)(1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Sonny Bono Copyright Term Extension Act.

"(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.".

(2) COPYRIGHT AMENDMENTS ACT OF 1992.—Section 102 of the Copyright Amendments Act of 1992 (Public Law 102-307; 106 Stat. 266; 17 U.S.C. 304 note) is amended—

(A) in subsection (c)—

(i) by striking "47" and inserting "67";

(ii) by striking "(as amended by subsection (a) of this section)"; and

(iii) by striking "effective date of this section" each place it appears and inserting "effective date of the Sonny Bono Copyright Term Extension Act"; and

(B) in subsection (g)(2) in the second sentence by inserting before the period the following: ", except each reference to

forty-seven years in such provisions shall be deemed to be 67 years".

Sec. 103 TERMINATION OF TRANSFERS AND LICENSES COVERING EXTENDED RENEWAL TERM.

Sections 203(a)(2) and 304(c)(2) of title 17, United States Code, are each amended—

(1) by striking "by his widow or her widower and his or her children or grandchildren"; and

(2) by inserting after subparagraph (C) the following:

"(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.".

Sec. 104 REPRODUCTION BY LIBRARIES AND ARCHIVES.

Section 108 of title 17, United States Code, is amended—

(1) by redesignating subsection (h) as subsection (i); and

(2) by inserting after subsection (g) the following:

"(h)(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

"(2) No reproduction, distribution, display, or performance is authorized under this subsection if—

"(A) the work is subject to normal commercial exploitation;

"(B) a copy or phonorecord of the work can be obtained at a reasonable price; or

"(C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

"(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.".

Sec. 105 VOLUNTARY NEGOTIATION REGARDING DIVISION OF ROYALTIES.

It is the sense of the Congress that copyright owners of audiovisual works for which the term of copyright protection is extended by the amendments made by this title, and the screenwriters, directors, and performers of those audiovisual works, should negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements with respect to the establishment of a fund or other mechanism for the amount of remuneration to be divided among the parties for the exploitation of those audiovisual works.

Sec. 106 EFFECTIVE DATE.

This title and the amendments made by this title shall take effect on the date of the enactment of this Act.

TITLE II—MUSIC LICENSING EXEMPTION FOR FOOD SERVICE OR DRINKING ESTABLISHMENTS

Sec. 201 SHORT TITLE.

This title may be cited as the "Fairness In Music Licensing Act of 1998".

Sec. 202 EXEMPTIONS.

(a) EXEMPTIONS FOR CERTAIN ESTABLISHMENTS.—Section 110 of title 17, United States Code, is amended—

(1) in paragraph (5)—

(A) by striking "(5)" and inserting "(5)(A) except as provided in subparagraph (B),"; and

(B) by adding at the end the following:

"(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

"(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—

"(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

"(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device

has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

"(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—

"(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

"(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

"(iii) no direct charge is made to see or hear the transmission or retransmission;

"(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

"(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed;"; and

(2) by adding after paragraph (10) the following:

"The exemptions provided under paragraph (5) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners for the public performance or display of their works. Royalties payable to copyright owners for any public performance or display of their works other than such performances or displays as are exempted under paragraph (5) shall not be diminished in any respect as a result of such exemption.".

(b) EXEMPTION RELATING TO PROMOTION.—Section 110(7) of title 17, United States Code, is amended by inserting "or of the audiovisual or other devices utilized in such performance," after "phonorecords of the work,".

Sec. 203 LICENSING BY PERFORMING RIGHTS SOCIETIES.

(a) IN GENERAL.—Chapter 5 of title 17, United States Code, is amended by adding at the end the following:

"s 512. Determination of reasonable license fees for individual proprietors

"In the case of any performing rights society subject to a consent decree which provides for the determination of reasonable license rates or fees to be charged by the performing rights society, notwithstanding the provisions of that consent decree, an individual proprietor who owns or operates fewer than 7 non-publicly traded establishments in which nondramatic musical works are performed publicly and who claims that any license agreement offered by that performing rights society is unreasonable in its license rate or fee as to that individual proprietor, shall be entitled to determination of a reasonable license rate or fee as follows:

"(1) The individual proprietor may commence such proceeding for determination of a reasonable license rate or fee by filing an application in the applicable district court under paragraph (2) that a rate disagreement exists and by serving a copy of the application on the performing rights society. Such proceeding shall commence in the applicable district court within 90 days after the service of such copy, except that such 90-day requirement shall be subject to the administrative requirements of the court.

"(2) The proceeding under paragraph (1) shall be held, at the individual proprietor's election, in the judicial district of the district court with jurisdiction over the applicable consent decree or in that place of holding court of a district court that is the seat of the Federal circuit (other than the Court of Appeals for the Federal Circuit) in which the proprietor's establishment is located.

"(3) Such proceeding shall be held before the judge of the court with jurisdiction over the consent decree governing the performing rights society. At the discretion of the court, the proceeding shall be held before a special master or magistrate judge appointed by such judge. Should that consent decree provide for the appointment of an advisor or advisors to the court for any purpose, any such advisor shall be the special master so named by the court.

"(4) In any such proceeding, the industry rate shall be presumed to have been reasonable at the time it was agreed to or determined by the court. Such presumption shall in no way affect a determination of whether the rate is being correctly applied to the individual proprietor.

"(5) Pending the completion of such proceeding, the individual proprietor shall have the right to perform publicly the copyrighted musical compositions in the repertoire of the performing rights society by paying an interim license rate or fee into an interest bearing escrow account with the clerk of

the court, subject to retroactive adjustment when a final rate or fee has been determined, in an amount equal to the industry rate, or, in the absence of an industry rate, the amount of the most recent license rate or fee agreed to by the parties.

"(6) Any decision rendered in such proceeding by a special master or magistrate judge named under paragraph (3) shall be reviewed by the judge of the court with jurisdiction over the consent decree governing the performing rights society. Such proceeding, including such review, shall be concluded within 6 months after its commencement.

"(7) Any such final determination shall be binding only as to the individual proprietor commencing the proceeding, and shall not be applicable to any other proprietor or any other performing rights society, and the performing rights society shall be relieved of any obligation of nondiscrimination among similarly situated music users that may be imposed by the consent decree governing its operations.

"(8) An individual proprietor may not bring more than one proceeding provided for in this section for the determination of a reasonable license rate or fee under any license agreement with respect to any one performing rights society.

"(9) For purposes of this section, the term 'industry rate' means the license fee a performing rights society has agreed to with, or which has been determined by the court for, a significant segment of the music user industry to which the individual proprietor belongs.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 17, United States Code, is amended by adding after the item relating to section 511 the following:

"512. Determination of reasonable license fees for individual proprietors.".

Sec. 204 PENALTIES.

Section 504 of title 17, United States Code, is amended by adding at the end the following:

"(d) ADDITIONAL DAMAGES IN CERTAIN CASES.—In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.".

Sec. 205 DEFINITIONS.

Section 101 of title 17, United States Code, is amended—

(1) by inserting after the definition of "display" the following:

"An 'establishment' is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

"A 'food service or drinking establishment' is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.";

(2) by inserting after the definition of "fixed" the following:

"The 'gross square feet of space' of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.";

(3) by inserting after the definition of "perform" the following:

"A 'performing rights society' is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc."; and

(4) by inserting after the definition of "pictorial, graphic and sculptural works" the following:

"A 'proprietor' is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.".

Sec. 206 CONSTRUCTION OF TITLE.

Except as otherwise provided in this title, nothing in this title shall be construed to relieve any performing rights society of any obligation under any State or local statute, ordinance, or law, or consent decree or other court order governing its operation, as such statute, ordinance, law, decree, or order is

in effect on the date of the enactment of this Act, as it may be amended after such date, or as it may be issued or agreed to after such date.

Sec. 207 EFFECTIVE DATE.

This title and the amendments made by this title shall take effect 90 days after the date of the enactment of this Act.

Approved October 27, 1998.

No. 01-618

In the Supreme Court of the United States

ERIC ELDRED, ET AL., PETITIONERS

v.

JOHN D. ASHCROFT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the 20-year extension of the terms of all copyrights, set forth in the Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827, violates the Copyright Clause of the Constitution.

2. Whether the CTEA's 20-year extension of the terms of all copyrights violates the First Amendment.

3. Whether a court of appeals may decline to consider arguments raised by an amicus that differ from the arguments raised by the party that the amicus seeks to support.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 239 F.2d 372. The opinion of the court of appeals (Pet. App. 24a-33a) on denial of rehearing and rehearing en banc is reported at 255 F.3d 849. The Memorandum and Order of the district court (Pet. App. 34a-39a) is reported at 74 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2001, and a petition for rehearing was denied on July 13, 2001. The petition for a writ of certiorari was filed on October 11, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Copyright Clause of the Constitution confers upon Congress the "power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, Cl. 8. Beginning in 1790, see Act of May 31, 1790, ch. 15, 1 Stat. 124, Congress has enacted a number of copyright statutes pursuant to that authority. The 1790 Copyright Act established a copyright term of 14 years and applied it both to newly created works and to subsisting works protected under the copyright laws of the various States. Act of May 31, 1790, § 1. Congress extended the term of copyright protection for new and subsisting copyrighted works again in 1831 and 1909. Act of Feb. 3, 1831, §§ 1-3, 4 Stat. 436-437; Act of Mar. 4, 1909, § 24, 35 Stat. 1075-1088. Currently, most copyright claims are governed by the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, codified as amended at 17 U.S.C. 101 *et seq.* As originally enacted, the Copyright Act of 1976 accorded the exclusive right to publish and reproduce an original work to the author of that work during the author's life plus 50 years. See 17 U.S.C. 302(a) (1978).

In 1998, Congress enacted the Sonny Bono Copyright Term Extension Act (CTEA or Act), Pub. L. No. 105-298, 112 Stat. 2827, bringing United States copyright law into conformity with the copyright laws of the European Union. See Pet. App. 13a. Among other things, the CTEA extends the terms of copyrights for 20 years. See CTEA, § 102(b) and (d), 112 Stat. 2827 (amending 17 U.S.C. 302, 304). Thus, an additional term of 20 years is added to the duration of all existing copyrights (*i.e.*, for all original works that, at the time of

the Act's effective date, had not yet fallen into the public domain). CTEA § 102(d), 112 Stat. 2827 (amending 17 U.S.C. 304). The Act also provides that any future copyrights will have a term of the life of the author plus 70 years. CTEA, § 102(b), 112 Stat. 2827 (amending 17 U.S.C. 302).

2. Petitioners brought this action in the United States District Court for the District of Columbia to challenge, among other things, the constitutionality of the CTEA's 20-year extension of existing copyrights. Specifically, they alleged that the extension violates the First Amendment and the Copyright Clause of the Constitution.

The parties filed cross-motions for judgment on the pleadings. By Memorandum and Order filed on October 28, 1999 (Pet. App. 34a-39a), the district court granted respondent's motion and denied petitioners'. The court first rejected petitioners' First Amendment claim. "The District of Columbia Circuit," the district court held, "has ruled definitively that there are no First Amendment rights to use the copyrighted works of others." *Id.* at 37a (citing *United Video, Inc.* v. *FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989), and *Harper & Row, Publishers, Inc.* v. *Nation Enterprs.*, 471 U.S. 539, 556 (1985)).

The court also held that Congress did not exceed its powers under the Copyright Clause of the Constitution by extending the terms of existing copyrights. The court stated that the duration requirement of that clause—which requires that copyrights persist only for "[l]imited [t]imes"—is "subject to discretion of Congress." Pet. App. 37a (citing *Pennock & Sellers* v. *Dialogue*, 27 U.S. (2 Pet.) 1, 16-17 (1829)). Congress, the district court further held, "has authority to enact retrospective laws under the copyright clause." *Id.* at

37a (citing *McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202, 206 (1843)).[1]

3. Petitioners appealed, and the court of appeals affirmed. Pet. App. 1a-16a. The court unanimously rejected petitioners' First Amendment claim, but one member of the panel dissented with respect to the claim that Congress had exceeded its powers under the Copyright Clause.

a. On the First Amendment claim, the court of appeals first held that petitioners have standing to challenge the CTEA's application both to subsisting copyrights and to future copyrights. Pet. App. 4a-5a. The court disagreed with the government's contention that petitioners lack standing to raise the latter challenge. Petitioners "benefit from works in the public domain and are deprived of that benefit so long as such works are under copyright," the court stated. That alleged deprivation, the court of appeals continued, is threatened as much "for works not yet created as for extant works on which the copyrights are about to expire." *Id.* at 5a.

On the merits of the First Amendment claim, the court held that this Court's decision in *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), and the D.C. Circuit's decision in *United Video, Inc.* v. *FCC*, 890 F.2d 1173 (1989), "stand as insuperable bars to [petitioners'] first amendment theory." Pet. App. 5a. Copyright, the court explained, merely gives

[1] The district court also rejected petitioners' argument that the extension violates the "to Authors" term of the Copyright Clause, and their claim that it violates the public trust doctrine. Petitioners did not renew those two distinct legal arguments in the court of appeals; nor have they attempted to do so in their petition to this Court.

the author an exclusive right in the form of expression; it does not give the author a monopoly on the idea or fact being expressed. See *id.* at 5a-6a. Accordingly, the court held, copyright laws do not infringe freedom of speech. *Id.* at 6a. Indeed, it continued, this Court had so recognized in *Harper & Row*. Pet. App. 6a (quoting 471 U.S. at 556).

The court of appeals rejected, as "wholly illusory," petitioners' attempt to distinguish *Harper & Row* and *United Video*. Pet. App. 7a. It is true, the court pointed out, that the litigants in those cases "demand-[ed] a right to use otherwise legitimately copyrighted material," *id.* at 6a, whereas petitioners in this case bring a "First Amendment challenge[] to the constitutionality of the statute granting a [copy]right in the first instance.'" *Ibid.* The court of appeals concluded, however, that the purported distinction did not make a logical difference. The relevant question for First Amendment purposes is "whether the party has a first amendment interest in a copyrighted work." *Id.* at 7a. Answering that question in the negative, the court concluded that petitioners "lack any cognizable first amendment right to exploit the copyrighted works of others." *Id.* at 8a.

b. The court of appeals also rejected petitioners' claim that the CTEA, by extending the duration of already existing copyrights, exceeds Congress's powers under the Copyright Clause. Petitioners had argued that Congress "cannot extend an extant copyright," because a pre-existing "copyrighted work already exists and therefore lacks originality." Pet. App. 8a. The court responded by pointing out that a "work with a subsisting copyright has already satisfied the requirement of originality, and need not do so anew for its copyright to persist." *Ibid.* Petitioners, the court

further noted, "point to no case or commentary * * * that calls into question the distinction between a new grant of copyright—as to which originality is an issue—and the extension of an existing grant." *Id.* at 9a.

c. The court of appeals also rejected petitioners' "contention that the CTEA violates the constitutional requirement that copyrights endure only for 'limited Times.'" Pet. App. 10a. Petitioners argued, in effect, that increases in the duration of an already existing copyright could not be justified under the Copyright Clause, because such increases would not "promote the Progress of Science and useful Arts." Petitioners' idea was that "the phrase 'limited Times' should be interpreted not literally but rather as reaching only as far as is justified by the preambular statement of purpose"—*i.e.*, that "if '50 years are enough to promote . . . Progress,' then a grant of 70 years is unconstitutional." *Ibid.*

That argument, the court of appeals held, was foreclosed by *Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 455 U.S. 948 (1982). In that case, the court of appeals "rejected the argument 'that the introductory language of the Copyright Clause constitutes a limit on congressional power.'" Pet. App. 10a (quoting *Schnapper*, 667 F.2d at 112). In this case, the court observed, petitioners did not ask that *Schnapper* be overturned. Instead, petitioners had urged the court of appeals to circumvent *Schnapper*'s holding by interpreting the term "limited Times" to take its meaning (and incorporate temporal limits) from the preamble. The court rejected that argument as unpersuasive. "[O]ne cannot concede that the preamble 'is not a substantive limit' and yet maintain that it limits the permissible duration of a copyright more strictly than does the textual requirement that it be for a

'limited Time.'" *Id.* at 10a-11a. Further, although petitioners relied on *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991), and *Trade-Mark Cases*, 100 U.S. 82 (1879), the court of appeals concluded that neither of those cases requires that the phrase "limited Times" be read as taking its substance from the preamble's statement of purpose. Instead, the court held, those cases turn on the meaning of the words "Authors" and "Inventions"—which imply an element of originality—and not on any independent effect of the Copyright Clause's preamble. Pet. App. 10a-11a.

d. The court declined to entertain or adopt an argument that had been raised solely by an amicus. Pet. App. 11a-12a. According to the amicus, *Schnapper* does not preclude courts from requiring that Copyright Clause legislation, viewed as a whole, promote science and the useful arts. Instead, the amicus argued, *Schnapper* merely bars courts from requiring that each case-specific application of the copyright power—the award and protection of copyrights in individual cases—promote science and the useful arts. Because that argument had been raised only by an amicus, and because it had not been adopted by any of the parties, the court concluded that it need not address it. *Id.* at 11a-12a. The decision not to address amicus's argument, the court further held, was supported by two prudential considerations. First, federal courts generally should not seek out constitutional issues not before them. *Id.* at 11a. Second, the court observed, the parties' "conspicuous[]" failure to adopt amicus's argument had prevented the government from being "alerted to any need to argue this point." *Ibid.* Because the government in fact did not argue the point,

the court deemed it inappropriate to resolve the issue without the benefit of full adversary presentation. *Ibid.*

The court also stated that, if it were required to address amicus's legal argument, it might well reject it. Even if the court were to agree that the Copyright Clause's preamble—"To promote the Progress of Science and useful Arts"—imposes a judicially cognizable limitation on Congress's power, the court "might well hold that the application of the CTEA to subsisting copyrights is 'plainly adapted' and 'appropriate' to 'promot[ing] progress.'" Pet. App. 12a (citing *Ladd* v. *Law & Techn. Press*, 762 F.2d 809, 812 (9th Cir. 1985), cert. denied, 475 U.S. 1045 (1986)). The court observed: "Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration." *Ibid.* (citing S. Rep. No. 315, 104th Cong. 2nd Sess. 12 (1996)).

e. Finally, the court found that the CTEA's constitutionality is reinforced by three further considerations. First, the CTEA "matches United States copyrights to the terms of copyrights granted by the European Union." Pet. App. 13a. "[I]n an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits for the exploitation of copyrights." *Ibid.*

Second, the claim that Congress lacks authority to extend the term of copyrights in existing works is refuted by historical practice. The First Congress "made the Copyright Act of 1790 applicable to subsisting copyrights arising under the copyright laws of the several states." Pet. App. 13a. The construction of the Constitution "'by [those] contemporary with its

formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed [for this long], it is almost conclusive.'" *Id.* at 14a (quoting *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 57 (1884)). Third, this Court had made it "plain" that Congress has the power "to amplify the terms of an existing patent." *Id.* at 14a-15a (citing *McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202, 206 (1843)). There is no reason, the court of appeals concluded, why Congress would lack similar power with respect to existing copyrights. *Id.* at 15a.

f. Judge Sentelle dissented in part. Although he agreed that Congress has authority to extend the term of copyright protection for future works, he concluded that Congress had exceeded its power under the Copyright Clause by extending the copyright term of *existing* works. Pet. App. 16a-23a. He maintained that the "concept of 'outer limits' to enumerated powers applies not only to the Commerce Clause but to *all* the enumerated powers, including the Copyright Clause." *Id.* at 17a (quoting *United States* v. *Lopez*, 514 U.S. 549, 552 (1995)). He stated that the Copyright Clause "is not an open grant of power to secure exclusive rights," but rather "a grant of a power to promote progress," by granting exclusive rights only for "limited times." *Id.* at 18a. In his view, "[e]xtending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time." *Id.* at 19a.

Accepting the arguments of an amicus, Judge Sentelle also expressed the view that *Schnapper* did not foreclose the court from looking to the language of the preamble to the Copyright Clause to determine the scope of the "limited Times" requirement. Pet. App.

20a. Instead, he read *Schnapper* as barring courts from requiring that each application of the Copyright Clause, in individual cases, actually have the effect of promoting science or art. Although the argument had not been raised by a party—it was raised only by an amicus—Judge Sentelle thought it proper for the court to consider the argument because it concerned an issue, the constitutionality of the CTEA, that was before the court. *Id.* at 21a-23a.

4. Petitioners filed a petition for rehearing en banc, which the court denied. Pet. App. 27a.

The panel majority issued an opinion on rehearing, reiterating its view that the contentions of petitioners' amicus were not properly before it, Pet. App. 24a-27a, and that it would be "'particularly inappropriate' in this case to reach" those contentions, *id.* at 25a. The majority stressed that petitioners had declined to adopt the position of its amicus. Under such circumstances, the court explained, it was proper to follow *New Jersey* v. *New York*, 523 U.S. 767, 781 n.3 (1998), and to refuse to address the argument. The majority also explained that its decision not to reach amicus's argument was supported by the principle of constitutional avoidance. The amicus's position "poses an additional constitutional question," the court explained, and therefore is "subject to the 'rule of avoidance.'" Pet. App. 26a (citing *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). Furthermore, the court continued, "because the plaintiffs-appellants did not take the same tack as the amicus, the Government did not on brief address the district court's interpretation of" *Schnapper*. Pet. App. 26a.

Finally, the court stated that, "even if we considered the amicus's position we would not reach a different result in this case." Pet. App. 26a. The court explained

that, even if one assumed that "the preamble limits the power of Congress, the CTEA still passes muster under the 'necessary and proper review' applicable to the Congress's exercise of a power enumerated in Article I." *Id.* at 26a-27a (citing 239 F.3d at 378 (Pet. App. 12a)). "Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration." *Id.* at 27a (citing 239 F.3d at 378 (Pet. App. 12a)).[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioners cite no decision of any court holding that Congress cannot, consistent with the Copyright Clause, enact legislation that extends the term of existing copyrights. They cite no decision of any court striking down an extension of copyright terms on First Amendment grounds. And they cite no decision of any other court addressing, much less rejecting, the validity of the Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112

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[2] Judge Sentelle (joined by Judge Tatel) filed a statement dissenting from the denial of rehearing en banc. Pet. App. 28a-33a. Judge Sentelle stated that the court's "opinion in this case effectively eliminates any role for *amicus curiae* in the practice of this circuit, when it holds that an argument raised by an *amicus* may not be considered by the Court." *Id.* at 28a. On the merits, Judge Sentelle reiterated his view that Congress lacks authority under the Copyright Clause to extend the copyright term for subsisting works. "Once a work is published," he stated, "extending the copyright term does absolutely nothing to induce further creative activity by the author." *Id.* at 32a-33a.

Stat. 2827. Accordingly, further review is not warranted.

1. Petitioners argue (Pet. 12-16) that the court of appeals' decision, insofar as it upholds Congress's power to extend the duration of existing copyrights, conflicts with decisions of this Court and with other courts of appeals. The asserted conflicts, however, do not exist. The issues on which petitioners identify conflicts are not implicated by this case. And the primary issue on which petitioners claim conflict is largely academic in this case, because the court of appeals' judgment is supported by an alternative holding.

a. Petitioners first claim that the decision below is inconsistent with *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966), *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991), and *Trade-Mark Cases*, 100 U.S. 82 (1879). None of those cases, however, addresses Congress's power to extend the term of an existing copyright. Nor do any of them address the constitutionality of the CTEA.

Nonetheless, petitioners claim that *Graham* establishes "that it would be beyond Congress's constitutional power to grant a patent [or a copyright] to a work in the public domain." Pet. 12. Even if *Graham* establishes that proposition, it has nothing to do with this case. Congress did not, by enacting the CTEA, reinstate copyright protection for works that had already entered the public domain. Instead, it extended the copyright protection accorded to copyrighted works that had not yet entered the public domain. As the D.C. Circuit stated, "[h]ere we ask not whether any work is copyrightable—indeed, the relevant works are already copyrighted—but only whether a copyright may by statute be continued in force beyond the renewal term specified by law when the

copyright was first granted." Pet. App. 9a. The court of appeals answered that question in the affirmative, and its answer is in no way inconsistent with *Graham*.

Petitioners' reliance upon *Feist* and *Trade-Mark Cases* is misplaced for the same reason. The principle of "originality" mandated by those decisions is not violated here. In the CTEA, Congress merely extended the term of properly copyrighted "original" works—works that had already met the requirement of originality in qualifying for protection in the first instance. Thus, this is not a case in which Congress has sought to protect works that lack originality. It is a case in which Congress has extended the term of protection for works that are concededly original, and were accorded copyright protection in the first instance precisely because they are original.

Unable to point to a conflict between the decision below and a holding of this Court, petitioners seem to argue that this Court's cases must be read as recognizing, *sub silentio*, that the preamble to the Copyright Clause—"To promote the Progress of Science and useful Arts"—creates a judicially manageable and enforceable limitation on Congress's copyright powers. That is true, they argue, because the preamble is the "only" possible source of the "originality" requirement this Court has recognized, and the only conceivable source of the asserted prohibition against removing works from the public domain. Pet. 12-13. A purported conflict between a decision of a court of appeals and hypothetical *sub silentio* reasoning that petitioners *attribute* to this Court is not a sound basis for further review.

Petitioners, in any event, are incorrect in claiming that the "originality" requirement and the alleged prohibition on Congress's removal of works from the public domain necessarily stem from the Copyright Clause's

preamble. To the extent the Copyright Clause itself imposes those limits, they would more logically stem from the *body* of the Copyright Clause, which authorizes Congress to grant to "*Authors* and *Inventors*" the "exclusive Right to *their* respective Writings and Discoveries." U.S. Const. Art. I, § 8, Cl. 8 (emphases added). The use of the possessive form—"their" writings—together with the words "Authors" and "Inventors" might be thought to preclude copyright protection for works that are not original or that are in the public domain; in such cases, the individuals seeking protection might not be considered the "authors," and the work might not be considered "theirs." Cf. *Frantz Mfg. Co.* v. *Phenix Mfg. Co.*, 457 F.2d 314, 327 n.48 (7th Cir. 1972) ("An author's 'Writing' or an inventor's 'Discovery' can, in the constitutional sense, only extend to that which is his own. It may not be broadened to include matters within the public domain."). Because Congress in the CTEA extended copyright protection only for *original* works that are *not* already in the public domain, the origin or scope of the requirement that works be "original," or of any prohibition on removing works from the public domain, is not at issue here.

The question here is whether Congress can extend the duration of an already subsisting copyright. Nothing in this Court's cases precludes Congress from enacting a statute that does so. Nor does any decision of this Court hold that the preamble to the Copyright Clause creates judicially manageable limits on Congress's authority in that regard. And historical practice amply supports the sensible view that Congress may extend the term of existing copyrights when it extends the term of copyrights for future works. Pet. App. 13a-14a & n.1 (noting that Congress extended the terms of

subsisting copyrights in 1790, 1831, and 1909); p. 2, *supra*. Indeed, as the court of appeals explained—and petitioners nowhere dispute—the First Congress "made the Copyright Act of 1790 applicable to subsisting copyrights arising under the copyright laws of the several states." Pet. App. 13a-14a (citing Act of May 31, 1790, §§ 1, 3, 1 Stat. 124-125). The construction of the Constitution by those "contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed [for this long], it is almost conclusive.'" *Id.* at 14a (quoting *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 57 (1884)). Petitioners nowhere explain why that practice should not be considered conclusive here.

b. Petitioners also argue (Pet. 14-15) that the court of appeals' decision on the scope of Congress's Copyright Clause powers conflicts with authority from other circuits. That claim of conflict, which principally relies on *Mitchell Brothers Film Group* v. *Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980), is wholly without merit.

As an initial matter, *Mitchell Brothers* did not involve a constitutional challenge to a statutory extension of the term of subsisting copyrights. Instead, it addressed the unrelated question of whether an obscene work may be copyrighted. The court answered that question in the affirmative, declaring that copyright statutes need not promote "progress" in science and the arts in every application. Far from creating a conflict with the holding or rationale of *Mitchell Brothers*, the D.C. Circuit in *Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 445 U.S. 948 (1982), specifically endorsed the Fifth Circuit's statement of the proper

scope of judicial review in a Copyright Clause challenge—a "necessary and proper" standard that does "not require that each copyrighted work be shown to promote the useful arts * * *." *Id.* at 112 (quoting *Mitchell Bros.*, 604 F.2d at 860). In this case, the D.C. Circuit merely followed its *Schnapper* ruling. Pet. App. 10a. Petitioners do not explain how a decision following *Schnapper*, which follows *Mitchell Brothers*, can have created a conflict with *Mitchell Brothers*.

Nor can one say that, under *Mitchell Brothers*, the Fifth Circuit would reach a different result from that reached by the D.C. Circuit here. To the contrary, far from contradicting the result reached by the court of appeals, *Mitchell Brothers*' broad view of Congress's powers under the Copyright Clause supports the D.C. Circuit's decision. The *Mitchell Brothers* court indicated that "it is up to Congress to decide upon the means by which the constitutional command will best be effectuated," and that Congress's copyright enactments are at most subjected to review under "the lenient" necessary-and-proper standard. 604 F.2d at 860. Applying that very standard to the CTEA, the court of appeals in this case concluded that the CTEA is necessary and proper to Congress's exercise of its enumerated Copyright Clause powers. Pet. App. 26a-27a; pp. 18-19, *infra*.

The remaining court of appeals' decisions cited by petitioners are even further afield. Pet. 15-16. The cases invoked by petitioners do not involve constitutional challenges to copyright statutes, but rather issues such as interpretation of the scope of a claimed exclusive right under patent law (*Frantz Mfg. Co.* v. *Phenix Mfg. Co.*, 457 F.2d 314 (7th Cir. 1972)); the scope of joint authorship under the Copyright Act (*Erickson* v. *Trinity Theatre*, 13 F.3d 1061 (7th Cir. 1994); *Aalmu-*

hammed v. *Lee*, 202 F.3d 1227 (9th Cir. 2000)); interpretation of the scope of "fair use" (*Rosemont Enter. Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966)); and the scope of a provision of the Copyright Act governing contributions to collective works (*Greenberg* v. *National Geographic Soc'y*, 244 F.3d 1267 (11th Cir.), cert. denied, 122 S. Ct. 347 (2001)). None of those statutory interpretation cases stands for the proposition that the Constitution requires a rigorous judicial inquiry into whether a particular congressional enactment under the Copyright Clause promotes the useful arts.

Likewise, those decisions—which involved neither a copyright extension statute nor the "limited Times" language of the Copyright Clause—neither compel nor support the conclusion that the Copyright Clause's preamble controls the meaning of the "limited Times" provision. And they certainly do not indicate that those courts would reach a different result if presented with the challenge to the CTEA that petitioners raise here. In sum, those decisions do not conflict with the D.C. Circuit's ruling, and provide no basis for further review of the decision below.[3]

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[3] Petitioners also predicate the supposed need for review on the hyperbolic claim that the decision below will permit Congress to extend the duration of copyrights indefinitely, one enactment at a time, and thereby circumvent the limited duration requirement. Pet. 9. As the court of appeals recognized, however, that "clearly is not the situation" here. Pet. App. 13a. Instead, the "temporal thrust of the CTEA is a good deal more modest: The Act matches United States copyrights to the terms of copyrights granted by the European Union." *Ibid.* That goal is unquestionably a permissible one. Indeed, that was precisely Congress's goal when it extended the duration of copyrights in 1831. See 7 Cong. Deb. App. CXIX (1830) (1831 change "to place authors in this country more nearly on an equality with authors in other countries.").

c. Petitioners, moreover, ignore the fact that the court of appeals' alternative holding, which independently supports the judgment below, would render this Court's resolution of the alleged circuit conflicts wholly advisory. The court of appeals held that, even if it were to agree that the phrase "To promote Progress of Science and the useful Arts" in the preamble acts as a substantive limit on Congress's authority under the Copyright Clause, it "would not reach a different result in this case." Pet. App. 26a. See also *id* at 12a-13a. Instead, the court concluded, the CTEA would still be within Congress's authority, because the CTEA is necessary and proper to Congress's exercise of its enumerated Copyright Clause powers. *Id.* at 26a-27a. As the court of appeals explained, "Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration. * * * Preserving access to works that would otherwise disappear—not enter the public domain but disappear—'promotes Progress' as surely as does stimulating the creation of new works." *Id.* at 27a (some internal quotation marks omitted). See also *id.* at 12a-13a. Nothing in the Constitution, in any event, compels Congress to establish a dual-system of copyright under which works created the moment before Congress enacts copyright term extension legislation must have a shorter term than works created the moment after. Rather, Congress was entitled to establish a system of copyright that treats authors in a more even-handed fashion.

In view of the court of appeals' alternative holding, the issues on which petitioners claim conflict are largely academic. Even if this Court were to hold that the preamble to the Copyright Clause imposes judicially

manageable limits on the scope of Congress's authority, as petitioners assert, the court of appeals' conclusion that Congress did not exceed its authority—because the CTEA does promote progress in the useful arts—would still stand.[4] Because this Court's resolution of the claimed conflicts would not alter the judgment below, further review would be inappropriate.

2. Petitioners' First Amendment claim fares no better. Petitioners initially contend (Pet. 18-22) that the D.C. Circuit's decision rejecting their First Amendment claim improperly expands this Court's decision in *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985). They are mistaken. In *Harper & Row*, the Court held that the First Amendment did not give a magazine the right to publish excerpts from President Ford's copyrighted memoirs in advance of their authorized publication. Explaining its decision, the Court stated:

> [C]opyright's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." 723 F.2d at 203. No author may copyright his ideas or the facts he narrates. 17 U.S.C. § 102(b). See, *e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713, 726, n. (1971) (Brennan, J., con-

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[4] This case, moreover, would be a particularly inappropriate vehicle for considering the correctness of that holding. Because the case was decided on cross-motions for judgment on the pleadings, the parties have not developed an extensive record regarding the extent to which extending existing copyrights might reasonably be thought to promote progress in the useful arts. The decision below, moreover, is the first to have considered that question.

> curring) (Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed).

471 U.S. at 556. Petitioners offer no reason why (absent viewpoint discrimination not present here) the idea/expression balance does not similarly prevent copyright from infringing their First Amendment rights. Nothing prevents them from using the ideas or facts contained in works protected by the CTEA. Nor do they explain why, to the extent anyone needs to use copyrighted expression, the "fair use" doctrine incorporated into the Copyright Act does not fully vindicate such interests. Indeed, this Court has indicated that it may be permissible to copy protected expression verbatim where "necessary adequately to convey the facts," or where particular expression is "so integral to the idea expressed as to be inseparable from it," *Harper & Row*, 471 U.S. at 563; and the "merger doctrine" similarly instructs that "[w]hen there is essentially only one way to express an idea, the idea and its expression are inseparable and copyright is no bar to copying that expression." *Yankee Candle Co., Inc.* v. *Bridgewater Candle Co., LLC*, 259 F.3d 25, 35-36 (1st Cir. 2001); see also *Ets-Hokin* v. *Skyy Spirits, Inc.*, 225 F.3d 168, 1082 (9th Cir. 2000) ("Under the merger doctrine, courts will not protect a copyrighted work from infringement if the idea underlying the copyrighted work can be expressed in only one way, lest there be a monopoly on the underlying idea.").

Instead, petitioners seek to distinguish *Harper & Row*. They argue that *Harper & Row* applies only where a litigant demands a right to use otherwise legitimately copyrighted material, and not to a First Amendment "challenge of the statutes under which

copyrights are established." Pet. 19-21. They cite no cases so holding, and any such distinction is illusory. As the court of appeals noted:

> The relevant question under the First Amendment —regardless whether it arises as a defense in a suit for copyright infringement or in an anticipatory challenge to a statute or regulation—is whether the party has a first amendment interest in a copyrighted work. The works to which the CTEA applies, and in which plaintiffs claim a first amendment interest, are by definition under copyright; that puts the works on the latter half of the "idea/expression dichotomy" and makes them subject to fair use. This obviates further inquiry under the First Amendment.

Pet. App. 7a. Indeed, if petitioners' distinction were accepted, the defendants in *Harper & Row* could have prevailed if they had claimed that the Copyright Act was *invalid* insofar as it purported to create a copyright in the work they appropriated, rather than claiming that they had a First Amendment right to use otherwise copyrighted work materials. Obviously, those alternative ways of framing the same First Amendment argument do not change the pertinent analysis and should not alter the proper result. In either case, the question is whether the litigant has a "cognizable First Amendment right to exploit" the work that Congress has purported to protect. Pet. App. 8a. Here, as in *Harper & Row*, petitioners may freely copy and use the facts and ideas contained in works subject to the CTEA, and may even copy original expression in such works to the extent permitted by the fair use doctrine and related principles. The con-

cerns and values reflected in the First Amendment are therefore fully satisfied.

Petitioners assert that the basis of the court of appeals' rejection of their First Amendment claim was that "there is no First Amendment right to trespass." Pet. 21. Seizing upon the term "trespass," they claim that "the D.C. Circuit's own authority in the context of abortion protester cases shows" the court's error. *Ibid.* Even if one were to assume that an intra-circuit conflict exists, it is well settled that such a conflict furnishes no basis for a grant of certiorari. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, petitioners simply miss the point. To accommodate First Amendment concerns, copyright statutes have long limited protection to the form of expression, and permitted others to use all facts and ideas contained in the copyrighted work. They similarly have permitted others to make "fair use" of even otherwise protected expression. It is the doctrine of fair use, as well as the doctrine "'under which ideas are free but their particular expression can be copyrighted,'" Pet. App. 6a, that ensures that copyright statutes remain largely immune from First Amendment challenges. Nothing in the abortion protest cases cited by petitioners undermines that principle.

Alternatively, petitioners argue that the D.C. Circuit's First Amendment holding conflicts with *CBS Broadcasting, Inc.* v. *Echostar Communications Corp.*, 265 F.3d 1193 (11th Cir. 2001). Pet. 22-24. The short answer is that the Eleventh Circuit, in rejecting a First Amendment challenge to a copyright statute in *CBS Broadcasting*, specifically endorsed the law of the D.C. Circuit in the copyright/First Amendment context, stating that "[t]here is 'no first amendment right to

* * * make commercial use of the copyrighted works of others.'" *CBS Broad.*, 265 F.3d at 1211 (quoting *United Video, Inc.* v. *FCC*, 890 F.2d 1173, 1190-91 (D.C. Cir. 1989)). Petitioners' claim of conflict thus is without merit.

3. Finally, in a footnote attached to the conclusion section of the petition, petitioners argue that amici have a right to inject additional arguments into a case, even if those arguments are not adopted by the parties. Pet. 26 n.13. This purely procedural issue, presented in a footnote, does not independently warrant the Court's review. Whether or not to consider additional arguments presented by amici, where those arguments are not adopted by the parties, is ordinarily entrusted to a court's discretion; while courts may consider such arguments, they may also decline to address them, especially where, as here, prudential reasons support that result. See *New Jersey* v. *New York*, 523 U.S. 767, 781 n.3 (1998) (declining to address an argument that the party has renounced, or renounced the benefit of).

Here, the court of appeals found strong prudential reasons that weighed against considering the arguments of amici, pp. 7-8, 10, *supra*, and any challenge to those case-specific reasons is likely to prove case-specific and of little continuing importance as well. Moreover, in light of the court of appeals' alternative holding—that the court would reach the same result even if it considered and accepted the amicus's legal theory (see Pet. App. 26a-27a)—any question concerning the scope of amicus participation is not properly presented in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, In his official capacity as Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

> "[T]here is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection. The Congress that can extend the protection of an existing work from 100 years to 120 years .... This, in my view, exceeds the proper understanding of enumerated powers reflected in the *Lopez* principle of *requiring some definable stopping point*."

Eldred v. Reno, 239 F.3d 372, 382 (D.C. Cir. 2001) (Sentelle, J., dissenting) (emphasis added).

The government's reply is important as much for what it does not say as for what it says. First, the government does not deny that there is a split in the circuits about two fundamental questions affecting the scope of Congress's Copyright Clause power. It argues that those conflicts do not "implicate" issues in this case (Opp. 12), but not that they don't exist.

Second, the government does not argue that these fundamental issues are unimportant, or do not merit this Court's attention. To the contrary, by singling out the third question presented and arguing that question does not merit Supreme Court review (Opp. 23), the government, by implication, acknowledges the special concern this Court has demonstrated for copyright cases, even without a direct conflict.[1] The claims of the Amici filed in this Court demonstrate the importance of the issues raised in this case to the preservation and extension of the public domain, and the

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[1] *See* Brief of Petitioners for Writ of Certiorari, *New York Times v. Tasini*, No. 00-201, 10 (asserting review in copyright cases is granted "even absent a direct circuit conflict," citing *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994); *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991); *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985); *Mills Music v. Snyder*, 469 U.S. 153 (1984); *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984)), *cert. granted* 531 U.S. 978 (2000).

need for this Court to resolve these issues quickly. *See, e.g.*, Brief of Amicus Curiae Internet Archive; Brief of Amici Curiae American Association of Law Libraries, *et al.*

Third, and most tellingly, the government offers no reply to Judge Sentelle's charge that its reading of the term "limited times" provides no "definable stopping point" to Congress's Copyright Clause power. *Eldred,* 239 F.3d at 382 (Sentelle, J., dissenting). Under the government's reading of the Clause, ratified by the decision below, there is no constitutional limitation on Congress's power to extend the term of copyright, so long as each extension is itself "limited."

Rather than answering Judge Sentelle's charge, the government instead characterizes as "hyperbolic" petitioners' (and presumably Judge Sentelle's) fear that Congress has already adopted the practice of perpetually extending the term of existing copyrights. That concern, the government asserts, is "clearly … not the situation here." (Opp. 17 n.3, citations omitted.) But petitioners are not attacking some vague fear about Congress's future practice. It is a fact, not hyperbole, that Congress has extended the term of subsisting copyrights *eleven times* in the past 40 years (Pet. 2), and that these extensions have grown from relatively short extensions of one or two years, to 19 years in 1976, and then 20 years in 1998. (*Id.*)

To resist petitioners' claims, the government argues (1) that the split in circuit authority is not relevant to the resolution of this case, (2) that petitioners' Copyright Clause claim was resolved against petitioners on an alternative ground, thereby rendering "this Court's resolution of the alleged circuit conflicts wholly advisory" (Opp. 18), and (3) that the Court of Appeals's decision is correct on the merits. All three arguments are wrong.

I. THERE IS A REAL AND GROWING SPLIT OF AUTHORITY MERITING THIS COURT'S REVIEW.

The government argues that there is no split in authority affecting the resolution of this case. This argument trivializes this Court's supervisory authority. Robert L. Stern & Eugene Gressman, SUPREME COURT PRACTICE 168 (7th ed. 1993) (recognizing cert. jurisdiction for conflict "in principle"). The government is correct that there is no split on whether the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (1998), is constitutional. That fact is unsurprising, as this is the first case to challenge a statute by Congress extending copyright terms.

But in resolving petitioners' claims in the court below, the D.C. Circuit relied upon two lines of authority that are themselves the subject of conflicts in principle. The government argues that the split affecting the meaning of the Copyright Clause is not sufficiently pronounced. (Opp. 17.) Petitioners disagree. But the government does not deny the split affecting the interaction between the Copyright Clause and the First Amendment (Opp. 22-23), and this split has become even more firmly entrenched in the two months since petitioners' initial filing.

These two separate conflicts fundamentally affect Congress's power under the Copyright Clause, and if either were resolved differently, then the outcome in this case would likely be different. Thus, it is completely appropriate for this Court to grant review, not only to resolve the important question of Congress's power to extend the term of copyright, but also to resolve two conflicts that will continue to engender confusion in lower courts.

A. There Is A 3-1 Split Over The Relevant Scope Of First Amendment Review Of A Copyright Statute.

Petitioners have maintained that there is a split in authority on whether copyright statutes should be tested under ordinary First Amendment review. The D.C. Circuit held that they should not — finding that "copyrights are categorically immune from challenges under the First Amendment." (Pet. App. 6a.) In considering a First Amendment challenge to what the government rightly calls "a copyright statute" (Opp. 22), the Eleventh Circuit expressly held that they should — applying intermediate First Amendment review to uphold the challenged statute. *CBS Broad., Inc. v. EchoStar Communications Corp.*, 265 F.3d 1193, 1211 (11th Cir. 2001).

This decision in the 11th Circuit has now been followed by the 4th Circuit, in a case addressing the same statute. *Satellite Broad. and Communications Ass'n v. FCC*, 2001 WL 1557809 (4th Cir. 2001). And less than one month ago, the Second Circuit followed the pattern of the 11th and 4th Circuits, applying intermediate scrutiny to "a copyright statute" that regulated technologies designed to circumvent copyright protection technologies. *Universal City Studios, Inc. v. Corley*, 2001 WL 1505495, *12-14 (2d Cir. 2001).

These decisions plainly evidence two different rules about the relationship between "copyright statute[s]" (Opp. 22) and ordinary First Amendment review. In the D.C. Circuit, "copyright *statutes* remain largely immune from First Amendment challenges." (Opp. 22, emphasis added.) In the 11th, 4th, and 2d Circuits, "copyright statutes" are not "immune from First Amendment challenges." (*Id.*) These results conflict.

The government treats this conflict as irrelevant to the merits of this case, because, as it writes, the 11th Circuit "specifically endorsed the law of the D.C. Circuit in the copyright/First Amendment context, stating that '[t]here is no first amendment right to * * * make commercial use of the

copyrighted works of others.'" (Opp. 22-23.) But petitioners have never asserted a First Amendment right to use the copyrighted works of others. Our only claim has been that courts within the D.C. Circuit should apply the same First Amendment review of "copyright statutes" as the courts in the 11th, 4th, and 2d Circuits have to determine if certain creative work can properly be copyrighted.

Had petitioners been allowed the benefit of the First Amendment rule from the 11th, 4th and 2d Circuits, then, we submit, the government would have been unable to meet its burden of demonstrating that the speech restrictive aspects of the CTEA were justified under intermediate review. Thus the split in authority that we allege directly affects the outcome of this case. Petitioners are not asking this Court to reapply a properly selected legal standard. Petitioners complain that the court below did not apply the proper legal standard *because the rule governing the selection of such a standard is in dispute*. By resolving this dispute now, this Court could set the standard that should govern challenges to copyright terms, and set the framework for the inevitable conflicts that will arise as copyright law intersects First Amendment interests.

B. There Is A 5-2 Split Over The Relevance Of The "Grant of Power" In The Copyright Clause To The Scope of Congress's Power.

Following its earlier decision in *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), the Court of Appeals held that the "grant of power" in the Copyright Clause (giving Congress the power "to promote the progress of Science and useful Arts") does not "constitute[] a limit on congressional power." *Eldred*, 239 F.3d at 378 (citations omitted). The court thus rendered this text a constitutional dictum. Only one other circuit has similarly dismissed the framers' text. *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 130 (8th Cir. 1985). Other circuits have tried to give meaning to the text. Following this Court's reasoning in *Graham v. John Deere*

Co., 383 U.S. 1 (1966), these circuits have read the "grant of power" to constrain Congress in the exercise of its Copyright Clause power. (Pet. 14-17.) As the Fifth Circuit wrote in *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), upholding the copyrightability of obscene works against a constitutional attack, while the "words of the copyright clause" do not require that *individual* copyrights be shown to "promote science or useful arts," they plainly do "require that *Congress* shall promote those ends." *Id.* at 859 (emphasis added). "Congress' power," the court concluded, "under this Clause *is limited to action that promotes the useful arts*." *Id.* at 860 (emphasis added).[2]

The government dismisses these cases by arguing that they were statutory cases interpreting the scope of the Copyright Act. (Opp. 16.) That claim is untrue about *Mitchell Brothers*, and is otherwise irrelevant. Petitioners have argued that the "grant of power" means something to the scope of Congress's copyright power in the majority of circuits. In the D.C. and Eighth Circuits, it does not. This difference is revealed in the courts' interpretation of the Copyright Act. But the difference, however revealed, is plainly relevant to, and possibly disposative of, petitioners' claims. The division in authority thus merits this Court's review.

II. THE COURT OF APPEALS DID NOT RESOLVE PETITIONERS' COPYRIGHT CLAUSE CHALLENGE UPON AN ALTERNATIVE GROUND.

The government argues that the D.C. Circuit resolved petitioners' Copyright Clause claim on the alternative ground that the CTEA is supported by Congress's power under the

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[2] The government asks "how a decision following *Schnapper*, which follows *Mitchell Brothers*, can have created a conflict with *Mitchell Brothers*." (Opp. 16.) The answer is simple: the D.C. Circuit misread the Fifth Circuit authority, and has thereby established authority that is in conflict with five other circuits.

Necessary and Proper Clause. (Opp. 18.) This is plainly wrong, as the government's own summary of the case demonstrates. (Opp. 10-11.) While the Court of Appeals did rely upon the Necessary and Proper Clause to reject *Amicus Eagle Forum's* interpretation of the "grant of power," it did not rely upon the Necessary and Proper Clause to reject *petitioners'* interpretation of the "grant of power."

While petitioners expressly adopted Amicus's argument at oral argument in the Court of Appeals (Tr. of Oral Arg. 17-18; Pet. App. 29a.), and continue to embrace it in this Court, Eagle Forum's argument is importantly different from the argument advanced by petitioners. Under its view, a statute granting copyrights to "Authors" for their "Writings" for "limited Times" may still be found not to "promote … progress." (It could, in other words, be found not to promote progress either because it is too strong, or too weak, despite its terms being "limited.") The "promote … progress" requirement, under this view, is an additional constraint on the Copyright Clause power, requiring a court to articulate a judicially manageable standard to enforce its limit.

Petitioners have advanced a different argument: that the meaning of "limited Times" should be read in light of the "grant of power" such that only those "Times" that could be said to "promote the Progress of Science" can be considered "limited Times" for purposes of the Copyright Clause. Under this view, the "grant of power" does not constitute an additional constraint beyond the textual constraints in the Copyright Clause, but instead helps inform the interpretation of those other textual constraints.

The D.C. Circuit did not address whether the Necessary and Proper Clause would justify the CTEA under petitioners' reading of the "grant of power." Nor could the Necessary and Proper Clause justify the CTEA under petitioners' reading of the clause. As this Court has recognized in *Printz v. United States*, it is not "proper" to read the scope of Congress's power

to extend in a way that is inconsistent with the Constitution's text *properly interpreted*. 521 U.S. 898, 924 (1997) (citing Lawson & Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297-326, 330-333 (1993)). If, as petitioners assert, "limited Times" should be read to exclude retrospective extensions because retrospective extensions could not "promote" anything, then the Necessary and Proper Clause cannot be relied upon to invert that interpretation of "limited Times."

III. THE GOVERNMENT'S REMAINING ARGUMENTS ON THE MERITS MUST FAIL

1. The government suggests that the implied constraints on Congress's copyright power derive from the possessive "their" in the Copyright Clause when attached to "Authors" and "Writings." (Opp. 14.) While this argument might well explain the "originality" requirement of *Feist Publ'ns v. Rural Tel. Ser. Co.*, 499 U.S. 340, 345 (1991), it cannot explain the holdings of *Graham*, 383 U.S. at 6, and *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989), that Congress cannot remove works from the public domain. Works in the public domain plainly have "Authors." There is no reason, then, on the government's account, why Congress could not extend copyrights to such "Authors" for "their" "Writings." The constraint of *Graham* forbidding such an extension must therefore arise elsewhere.

2. The government argues that the framers' initial copyright statute demonstrates that they intended Congress to have the power to perpetually extend the term of existing copyrights. (Opp. 15.) The government is correct that the first statute extended copyrights to works "already printed." Act of May 31, 1790, ch. 15, §1, 3, 1 Stat. 124-25. But it does not follow that the First Congress thereby intended to extend the *term* of any copyright. In 1790, there was still an important uncertainly about whether copyrights were

protected by common law, or whether they were solely a creation of positive law. *Wheaton v. Peters*, 33 U.S. (8 Peters) 591 (1834) (rejecting common law copyright but acknowledging differing views). If copyrights were protected by common law, then the effect of the 1790 statute would be to terminate that common law right and restrict the resulting term to the term of the federal statute. The same would be true for state copyrights. Federal terms could well have been less than the remaining state terms, and there is nothing to indicate that Congress intended to extend those state terms.

The better view of the 1790 statute is that it resolved a transitional problem created by the enactment of a federal power protecting copyrights, in light of the spotty protection granted by states. *See* Lyman Ray Patterson, COPYRIGHT IN HISTORICAL PERSPECTIVE 181 (1968). Congress's additional requirement that authors of works "already printed" must register their works to obtain the benefit of the federal copyright buttresses petitioners' claim that the framers were not granting Congress the power to extend copyright regardless of whether it "promoted … progress." *See* Act of 1790, *supra*, §3.

3. Finally, the government cites this Court's decision in *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843), as authority for the proposition that Congress has the power to extend existing terms. As the government states, "this Court had made it 'plain' that Congress has the power 'to amplify the terms of an existing patent.'" (Opp. 9, citing *McClurg*.) But *McClurg* did not address a *term extension*. It upheld a statute that "authorized the issuing [of] a new patent, when an original one was invalid by accident, inadvertence, or mistake, and without any fraudulent intent…." 42 U.S. at 207. The equitable power to correct mistakes in the administration of the patent office cannot ground a general power to extend the terms of all existing copyright terms.

IV. IMMEDIATE RESOLUTION OF THESE ISSUES IS REQUIRED TO AVOID ENORMOUS HARM.

As the briefs from Amici Internet Archive and American Association of Law Libraries *et al.* demonstrate, the cost of delaying resolution of the questions raised in this case is enormous. Despite the unsubstantiated assertions of the government, Amici offer direct evidence of the loss of film and other creative work that will flow from the perpetual extension of copyright. As Amicus American Association of Law Libraries *et al.* argues, the overwhelming majority of restored films, for example, were only restored after they entered the public domain. (Amicus AALL 19-20.) The practice of copyright holders has not been to protect and preserve this work generally. Instead, copyright regulation has put a great deal of this work effectively out of public reach.

In other copyright act contexts, this Court has recognized the importance of a speedy resolution of Copyright Clause questions. In *New York Times v. Tasini, supra*, for example, this Court granted review in light of the dangers to speech that delay would produce, despite the absence of any direct conflict in that case. Petitioners suggest that the same concern should guide the Court here. Congress has abandoned the framers' plan of requiring that work pass into the public domain after a "short interval." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 502, at 402 (R. Rotunda & J. Nowak eds., 1987). Given the possibilities of digital production as described by Amicus Internet Archive, this change in the framers' practice now threatens to obliterate a great deal of our common culture. In light of the ongoing conflict among the circuits, there is no good reason for the Court to wait to resolve the questions presented by this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, ET AL.,

Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF COPYRIGHT LAW PROFESSORS IN SUPPORT OF THE PETITION

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1998

QUESTIONS PRESENTED

1. Does the language of Art. 1, § 8, cl. 8 of the Constitution, giving Congress "power…To promote the Progress of Science and useful Arts" impose substantive constraints on Congress's enactments under that clause?

2. Are copyright laws "categorically immune" from First Amendment scrutiny?

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INTERESTS OF AMICI CURIAE[1]

This brief *amici curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court. Counsel for petitioner and respondent have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

Amici are copyright law professors at American universities. Jessica Litman is Professor of Law at Wayne State University. Dennis Karjala is Professor of Law at Arizona State University. Laura N. Gasaway is the Director of the Law Library and Professor of Law at University of North Carolina. Keith Aoki is Professor at the University of Oregon School of Law. Stephen R. Barnett is Professor of Law at the University of California at Berkeley. Ann Bartow is Assistant Professor of Law at the University of South Carolina School of Law. James Boyle is Professor of Law at Duke University. Dan L. Burk is the Julius E. Davis Professor of Law at the University of Minnesota. Julie E. Cohen is Professor of Law at Georgetown University Law Center. Shubha Ghosh is Associate Professor of Law at University at Buffalo Law School, State University of New York. Paul Heald is the Allen Post Professor of Law at the University of Georgia. Lydia Pallas Loren is Associate Professor of Law at Northwestern School of Law, Lewis and Clark College. Michael J. Madison is Assistant Professor of Law at the University of Pittsburgh. Michael J. Meurer is Associate Professor of Law at Boston University School of Law. Tyler T. Ochoa is Associate Professor and Co-Director of the Center for Intellectual Property Law at Whittier Law School. L. Ray Patterson is the Pope Brock Professor of

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[1] No counsel for a party authored this brief in whole or part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

Law at the University of Georgia. Malla Pollack is Visiting Associate Professor and Visiting Scholar at Northern Illinois University College of Law. R. Anthony Reese is Assistant Professor of Law at the University of Texas at Austin. Pamela Samuelson is the Chancellor's Professor of Law at the University of California at Berkeley. Alfred C. Yen is the Associate Dean for Academic Affairs and Professor of Law at Boston College Law School. Diane L. Zimmerman is Professor of Law at New York University School of Law.

Amici are deeply concerned with the integrity of copyright law and with the constitutional goals of promoting authorship and innovation and of encouraging the broad dissemination of works of authorship. They are concerned that Congress should grant rights to copyright owners in a manner that is consistent, rather than in conflict, with those goals. In their capacity as educators, amici make extensive use both of works protected by copyright and works in the public domain.

INTRODUCTION

Amici support petitioners' argument that the court of appeals erred in rejecting petitioners' challenges to the Copyright Term Extension Act based on the Copyright Clause and the First Amendment. Amici submit this brief to make the Court aware of the importance of the decision below and its potential to do significant damage in a wide range of copyright cases.

SUMMARY OF ARGUMENT

The Court of Appeals for the D.C. Circuit erred in holding that the initial language of the Copyright Clause imposes no substantive limit on congressional power. In

reaching this result, the court of appeals ignored the decisions of this Court on the scope of the constitutional power to enact patent and copyright laws. The lower court compounded its error by concluding that copyright laws are immune from challenge under the First Amendment. If the D.C. Circuit's opinion is allowed to stand, then any law purporting to be enacted pursuant to the Copyright Clause will be insulated from constitutional limitations. Nothing in the text of the Constitution or in this Court's decisions supports such a result.

ARGUMENT

I. CONGRESS'S POWER TO ENACT COPYRIGHT LEGISLATION IS CONSTRAINED BY THE LANGUAGE OF THE CLAUSE THAT GRANTS THAT POWER.

The Copyright Term Extension Act was enacted pursuant to Congress's power under the Patent and Copyright Clause, which provides:

> The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The Constitutional text does two things. First, it empowers Congress to enact statutes that "promote the Progress of Science and useful Arts," much as other clauses of Art. 1, § 8 empower Congress to enact statutes that "regulate Commerce . . . among the several States," or that "establish Post Offices and Post Roads." Second, it sharply limits the *means* Congress may adopt to achieve that end: Congress, in exercising this power, is limited to "securing

for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

In this case, the court of appeals held that the Constitutional language granting Congress the power to "promote the Progress of Science and useful Arts" is mere surplusage. According to the court of appeals, this language imposes no limit on Congress's power to enact statutes under the clause. The court of appeals gave no authority in the text of the Constitution or the opinions of this Court to support its extraordinary view. It concluded that this rule was required by its holding in *Schnapper v. Foley*, 667 F.2d 102 (D.C.Cir. 1981). *See Eldred v.* Reno, 239 F.3d 372, 378 (D.C. Cir. 2001). But this view is plainly mistaken.

It is well-settled that the Constitutional language conferring a power on Congress constrains the scope of that power. That is the very purpose of the Constitutional text: The "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). In the Commerce Clause context, the Court has been clear: "limitations on the commerce power are inherent in the very language of the Commerce Clause." *United States v. Lopez*, 514 U.S. 549, 553 (1995)(discussing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824)). Elsewhere, the Court has been similarly emphatic that Congress's power is "set in the clause which confers it." *United States v. Butler*, 297 U.S. 1, 66 (1936). The "language of the Constitution itself," for example, mandates that Congress exceeds its Spending Clause power "to lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare," U.S. Const., Art. I, § 8, cl. 1, if its action is not in fact intended to serve the "general welfare." *South Dakota v. Dole*, 483 U.S.

203, 207 (1987). Similarly, the Court held in *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 471 (1982), that "[t]he language of the Bankruptcy Clause," granting Congress power to "establish Uniform Laws on the subject of Bankruptcies," compelled a holding that Congress had no power to enact nonuniform bankruptcy laws. Although the Constitutional text may not be the end of the Court's analysis in assessing the scope of congressional power, it is always the beginning. *See Boerne v. Flores*, 521 U.S. 507, 519 (1997).

The Constitutional text could not be more plain that the power conferred on Congress by Art. I, § 8, cl. 8 is a "power . . . To promote the Progress of Science and useful Arts." If an enactment cannot plausibly be said to be directed toward those goals, therefore, it is outside the scope of the power. This Court expressly so held in *Graham v. John Deere*, 383 U.S. 1 (1966), in which it articulated the constitutional constraints on Congress's patent power:

> At the outset it must be remembered that the federal patent power stems from a specific constitutional provision which authorizes the Congress "To promote the Progress of ... useful Arts, by securing for limited Times to ... Inventors the exclusive Right to their ... Discoveries." Art. I, § 8, cl. 8. The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the "useful arts." It was written against the backdrop of the practices -- eventually curtailed by the Statute of Monopolies -- of the Crown in granting

> monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must "promote the Progress of ... useful Arts." This is the *standard* expressed in the Constitution and it may not be ignored.

Graham v. John Deere, 383 U.S. 1, 5-6 (1966) (emphasis in original; footnote and citation omitted). *See also Trade-Mark Cases*, 100 U.S. 82, 93 (1879); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834)(interpreting the word "secure" in the Copyright Clause by reference to "the words and sentences with which it stands connected" and noting that the clause's application to both authors and inventors precluded finding that either had a perpetual right at common law); Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 381-83 (2000). The Court of Appeals for the D.C. Circuit failed to advance any reason that the clause granting Congress the power to enact patent and copyright laws should be read to limit Congress's power to enact patent legislation, but to impose

no limit whatsoever on Congress's power to enact copyright legislation. Rather, the D.C. Circuit concluded that its reading of the Constitution was compelled by its earlier decision in *Schnapper v. Foley*, a decision that does not even mention this Court's opinion in *John Deere*.

Nor would it have made sense for the court of appeals to hold that the same Constitutional language is limiting in patent cases, but meaningless in copyright cases. This Court has frequently invoked that very language in explaining the scope of the copyright laws. As this Court has repeatedly reminded lower courts, "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991). *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 428-29, 431-32 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). *Accord Harper & Row v. Nation Enterprises*, 471 U.S. 539, 546 (1985).

This misunderstanding has implications that reach far beyond the question whether the Copyright Term Extension Act contravenes Article I, § 8, cl. 8 of the Constitution. In recent years Congress has enacted a number of innovative copyright laws that seek to extend copyright owners' control of their works. Several of these laws depart from the traditional copyright model, and arguably exceed the scope of Congress's copyright power. In 1998, for example, Congress enacted a law forbidding individuals from circumventing technological protection in order to gain unauthorized access to a protected work, regardless of whether the reason for seeking unauthorized access was to copy protected expression or to view unprotected facts, ideas, processes, systems. *See Digital*

Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2863 (1998), (codified as amended at 17 U.S.C. § 1201). The law, further, prohibits anyone from supplying a device or service designed to assist in circumventing technological protection. *Id.* The district court for the Southern District of New York has held that this law is not subject to the fair use privilege. *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 219 (S.D.N.Y. 2000)("If Congress had meant the fair use defense to apply to such actions, it would have said so.").

In 1993, 1994, and again in 1998, Congress enacted laws that restored copyright protection to works that had entered the public domain. *See North American Free Trade Agreement Implementation Act*, Pub. L. No. 103-182, 107 Stat. 2057, 2115 (1993); *Uruguay Round Agreements Act*, Pub. L. No. 103-465, 108 Stat. 4809, 4976 (1994), (codifed as amended at 17 U.S.C. § 104A); *Sonny Bono Copyright Term Extension Act*, Pub. L. No. 105-298, 112 Stat. 2827 (1998)(codified in 17 U.S.C. §§ 104A, 302, 303, 304). *See also Golan v. Ashcroft*, No. 01-B-1854 (D. Colo., filed Sept. 19, 2001)(challenging constitutionality of copyright restoration). Congress has considered and the House of Representatives has on three occasions passed legislation that would extend intellectual property protection under Title 17 to the factual content of collections of information. *See* H.R. 354, 106th Cong., 1st Sess. (1999); H.R. 2281, §§ 501-502 , 105th Cong, 2d Sess. (Engrossed House Bill 1998); H.R. 2652, 105th Cong., 1st Sess. (1997).

According to news reports, Congress is currently considering legislation that would prohibit the manufacture, sale, or distribution of any computer or other

digital device[2] unless it incorporates government-certified copyright-protection technology. *See Security Systems Standards and Certification Act* (Staff Working Draft, Aug. 6, 2001). *See, e.g.*, Dan Gillmor, *Entertainment Control Freaks have an Ally in Microsoft*, San Jose Mercury News (Oct. 24, 2001); *Proposed Hollings Bill on Copyright Alarms Internet Libertarians*, Washington Internet Daily (September 11, 2001); *Cyber Security: Hearing Before the House Science Committee*, 107th Cong., 1st Sess. (October 10, 2001)(testimony of Eugene H. Spafford, Professor of Computer Science, Purdue University).

Some or all of these laws may be comfortably within the limitations of Congress's copyright power, but, under the analysis adopted by the court of appeals, that determination would never be made. Nothing in the Constitutional text or in this Court's decisions supports such a result.

II. COPYRIGHT LAWS ARE NOT CATEGORICALLY IMMUNE FROM FIRST AMENDMENT SCRUTINY

The lower court's conclusion that copyright laws are never subject to First Amendment challenge compounds the gravity of its error. The court read its own earlier opinion in *United Video, Inc. v. F.C.C.*, 890 F.2d 1173 (D.C. Cir. 1989), as having held "that copyrights are categorically immune from challenges under the First

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[2] SSSCA § 109 defines the devices subject to the prohibition to include: "any machine, device, product, software, or technology, whether or not included with or as part of some other machine, device, product, software, or technology, that is designed, marketed or used for the primary purpose of, and that is capable of, storing, retrieving, processing, performing, transmitting, receiving, or copying information in digital form."

Amendment." *Eldred*, 239 F.3d at 375. It concluded that that opinion, and this Court's decision in *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), represented "insuperable bars" to plaintiffs' First Amendment challenge, 239 F.3d at 375, or, indeed, any First Amendment challenge to any copyright law.

In *Harper & Row*, this Court rejected the claim that the First Amendment required it to recognize a special privilege to quote the protected expression of former public officials. It examined the copyright law and found that existing law amply accommodated the First Amendment interests asserted by respondent. 471 U.S. at 559-60. In view of the fact that the Framers intended copyright to be the "engine of free expression," *id.* at 558, this Court held that the idea/expression dichotomy and the privilege of fair use already embodied in the copyright statute supplied sufficient protection for First Amendment interests to obviate the need for a special public official privilege. Far from holding copyright laws immune from First Amendment scrutiny, this Court subjected the law to First Amendment scrutiny and found it fully consistent with the First Amendment's requirements. *Id.* at 555-60.

The court of appeals read *Harper & Row* to preclude First Amendment examination of copyright laws. The illogic of that view is clear. Most obviously, this Court's holding in *Harper & Row* was predicated on the existence of the idea/expression dichotomy and the fair use doctrine to accommodate the First Amendment concerns raised in that case. Were Congress to enact a law repealing or limiting sections 102(b) or 107 of the copyright statute, the teaching of *Harper & Row* is that that law would be in serious jeopardy under the First Amendment. But that is hardly the only First Amendment issue that could arise. A repeal of section 105, which withholds copyright from

government works, plainly would require First Amendment analysis. (This is not fanciful; the United States, in fact, asserts ownership of copyright in United States government works abroad.) A law withholding copyright protection from any text expressing terrorist sentiments would similarly be vulnerable to First Amendment challenge. Interpreting *Harper & Row* as creating a categorical First Amendment immunity, thus, is insupportable.

The current copyright statute has been amended repeatedly since 1985. *See Work Made For Hire and Copyright Corrections Act of 2000*, Public L. 106-379, 114 Stat. 1444 (1999); *Intellectual Property and Communications Omnibus Reform Act of 1999*, Public L. 106-113, 113 Stat. 1501, 1501A-521 (1999); *Digital Theft Deterrence and Copyright Damages Improvement Act*, Public L. 106-160, 113 Stat. 1774 (1999); *Digital Millennium Copyright Act*, Public L. 105-204, (1998); *No Electronic Theft (NET) Act*, Public L. 105-147, 111 Stat. 2678 (1997); *Anti-counterfeiting Consumer Protection Act* , Public L. 104-153, 110 Stat. 1386, 1388 (1996); *Digital Performance Right in Sound Recordings Act*, Public L. 104-39, 109 Stat. 336 (1995); *Audio Home Recording Act*, Public L. 102-563, 106 Stat. 4237 (1992); *Copyright Renewal Act*, Public L. 102-307, 106 Stat. 264 (1992); *Computer Software Rental Amendments*, Public L. 101-650, 104 Stat. 5089, 5134 (1990); *Copyright Remedy Clarification Act*, Public L. 101-553, 104 Stat. 287 (1990). It is not the same law as the law before the Court in 1985. To hold that a particular copyright statute is fully consistent with the First Amendment is a far cry from establishing that any copyright law ever enacted will always be consistent with the First Amendment. *See* Neil Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stanford L. Rev. 1, 12-29 (2001).

Congress has recently enacted, or is now considering, a variety of statutes posing First Amendment issues that cannot be avoided by a talismanic invocation of *Harper & Row*. Section 1201 of the copyright statute, enacted in 1998, protects works from unauthorized access without regard to the idea/expression dichotomy, and has been interpreted by the district court for the Southern District of New York to be immune from any defense based on fair use. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 321-24 (S.D.N.Y. 2000); *see also Felten v. Recording Industry Association of America*, No. CV-01-2669 (D.N.J. filed June 6, 2001)(seeking declaratory judgment that § 1201 does not prohibit publication of computer scientist's scholarly research paper). The House of Representatives has passed legislation extending intellectual property protection under Title 17 to collections of factual information. *See, e.g.*, H.R. 354, 106th Cong., 1st Sess. (1999). Under the reasoning of the court of appeals, no First Amendment challenge could be brought against any of these enactments. That position has no support in logic nor in this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* THE INTERNET ARCHIVE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

This brief *amicus curiae* in support of Petitioners is submitted by the Internet Archive ("The Archive") pursuant to Rule 37 of the Rules of this Court. The Archive urges that the Court grant the requested writ of certiorari and reverse the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

The Archive[2] is a public nonprofit that was founded to build an "Internet library," with the purpose of offering permanent access for researchers, historians, and scholars to historical collections in digital format. Founded in 1996 and located in the Presidio of San Francisco, California, the Archive receives data donations from a multitude of resources, including libraries, educational institutions, and private companies.

Libraries exist to preserve and provide access to society's cultural artifacts. To continue to foster education and scholarship in this era of digital technology, libraries must extend into the digital world. Libraries depend heavily on public domain materials to serve their mission of preservation and access. The Copyright Term Extension Act of 1998 ("CTEA")[3] frustrates the Archive's goals of preservation and universal access thereby denying the public its rightful access to public domain works.

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1. Letters from all parties consenting to the filing of this brief are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, made a monetary contribution to the preparation or submission of this brief. Professor Lemley contributed to this brief in his personal capacity, and its contents should not be attributed to his employers. The Clinic is thankful for the help and guidance of Michael Levy Manager, Law Library Computing and Lecturer in Law and Kathleen Vanden Heuvel Deputy Director, Law Library and Lecturer in Law.

2. For more information on the Internet Archive, *see* http://www.archive.org/about/index.html.

3. Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827.

The Archive submits this brief to increase the Courts understanding of the true cost of the CTEA to our cultural heritage.

SUMMARY OF ARGUMENT

Digital technology promises to change the world. The little ones and zeros that travel from, to, and through the computers we use provide powerful opportunities, especially for storage and transmission of media. Before the advent of digital technology, the use and reuse of published works was subject to an entirely different reality. Jack Valenti, President of the Motion Picture Association of America once said: "A public domain work is an orphan. No one is responsible for its life . . . it becomes soiled and haggard . . ." JESSICA LITMAN, DIGITAL COPYRIGHT 77 (2001). Before digital technology, Valenti may have had an argument — one could argue that it was so expensive to store, reproduce, and distribute physical works that keeping them out of the public domain may have resulted in more availability than letting them in.

With digital technology, however, this argument can no longer stand. Indeed, even Valenti now agrees that digital technology possesses the capacity to makes flawless copies trivial and worldwide distribution instantaneous.[4] This ease of publishing and distributing means that material in the public domain is universally available. The public domain has assumed a central role in education in this country and around the world. Projects to digitize and give away millions of out-of-copyright books, movies, and music are now underway, funded by foundations, the government, and indeed corporations.[5] Yet the

4. "But, with the increased availability of broadband Internet access you can bring down a full-length motion picture in less than 15 minutes . . ." Press Release, Motion Picture Association of America, Valenti Warns The Dangers Of Internet Piracy Before Congressional Subcommittee (October 28, 1999), *available at* http://www.mpaa.org/jack/99/99_10_28a.htm.

5. Raj Reddy, *Infinite Memory and Bandwidth: Implications for Universal Access to Information* (April 6, 2001) *available at* http://www.cc.gatech.edu/external.affairs/anniversary/rajreddy.ppt.

projects are directly confronting the largest barrier to making our cultural heritage available to all — the repeated extension of copyright terms at the expense of the public domain.

The *Eldred* decision comes at a critical time for our culture and its artifacts. For the second time in history the collection of *all recorded information* is within our grasp.[6] Digital technology allows us the opportunity to build a "universal" library that dwarfs the collections of the Alexandria Library and even our modern Library of Congress. This library will expand our understanding of "public access." It will make information accessible in formats that uniquely support and promote creativity in the arts and sciences — allowing individuals to clip and sample millions of words, films, and music recordings with ease. At the same time digitization will greatly reduce the cost of preserving our cultural history and eliminate deterioration caused regularly through the physical handling of cultural artifacts. Through digitization, we can inexpensively open the full contents of this new library to the public, especially to those for whom access has been a half-kept promise — the distant, the deaf, and the blind. A universally accessible archive of print, audio, and visual materials is within our grasp.

In passing the CTEA, Congress deprives the public of this universally accessible library. Because the exclusive rights of copyright holders today include the rights to reproduce, distribute, perform, or display the copyrighted work or derivative works, providing access to a copyrighted work by posting it on the Internet invites accusations of copyright infringement. 17 U.S.C. § 501, *et seq*. Therefore, it is only works that have clearly fallen into the public domain that can safely be added to this universally accessible library. If the CTEA stands, it will prevent books, films, and other copyrighted works on the verge

6. LUCIANO CANFORA, THE VANISHED LIBRARY (1990) (discussing the history and politics of the great Greek Library of Alexandria); Brewster Kahle, Rick Prelinger, and Mary E. Jackson, *Public Access to Digital Material*, 7 D-LIB MAGAZINE (October 2001), *available at* http://www.dlib.org/dlib/october01/kahle/10kahle.html.

of entering the public domain from being successfully preserved in digital form, thereby denying the public this rich and fertile collection of our past.

In the sections that follow, we describe four specific areas where digital archives can revolutionize learning and creativity — greater access, preservation, economy, and extension of works — and demonstrate how the CTEA frustrates each to the detriment of the public interest. These four areas are not simply fringe benefits or surplusage residual from the creation of copyrighted works; they are the real benefit of the bargain that the public is entitled to enjoy and may ultimately prove more important to our nation's progress than access to copyrighted works during their limited term. Should this Court permit the D.C. Circuit's decision to stand, it will be turning its back on the intent of the Framers and this Court's consistent statements that copyright serves public as well as private purposes.

ARGUMENT

I. The Public Domain Is An Essential And Historical Part Of American Intellectual Property Law

"Copyright law is not an insurance policy for authors, but a carefully struck balance between the need to create incentives for authorship and the interests of society in the broad accessibility of ideas." *New York Times Co., Inc. v. Tasini*, 121 S. Ct. 2381, 2403 n.20 (2000) (Stevens, J., dissenting) (citing U.S. CONST., ART. I, § 8, cl. 8). "Authorial incentive comes at the expense of the equally important public interest." *Id.* In granting Congress the power to create copyrights, the Founding Fathers recognized that information and ideas were powerful yet ephemeral assets that required narrow and limited rights designed to promote American arts and sciences economically as well as culturally.

The Founders focused the rights of authors through several explicit Constitutional limitations on Congress' grant of power. First, the Constitution requires that works be original so that copyright owners cannot remove art and information from the public domain, declaring dominion over something they did not create. *Feist Publ'ns v. Rural Tel. Ser. Co.*, 499 U.S. 340 (1991); *Graham v. John Deere & Co.*, 383 U.S. 1 (1966). Second, works must promote the progress of the arts and sciences so the public receives value in return for each monopoly grant. *Trademark Cases*, 100 U.S. 82 (1879). Third, the First Amendment requires that copyright law permit certain "fair uses" of protected works to benefit society. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985) (subsequently codified at 17 U.S.C. § 107). Finally, the Constitution permits the grant of copyrights only for "limited times." U.S. CONST. ART. I, § 8, cl. 8. This last right guarantees that copyrights will eventually expire, and that the public will ultimately receive the right to use all works.

A healthy public domain is essential to a healthy intellectual property regime. In *Harper & Row*, this Court stated that "copyright is intended to increase and not to impede the harvest of knowledge." 471 U.S. at 545. To reap these benefits, the public must not only be permitted to make certain uses of works during the copyright term, but must also be free to make unfettered use of works through public consumption, study, and re-exposition after the copyrights expire. As the *Harper & Row* Court explained, copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, *and to allow the public access to the products of their genius after the limited period of exclusive control has expired.*" *Id.* at 546 (emphasis added). Thus, the promotion of public disclosure of information is equally as important in intellectual property policy as incentives for creation. *Graham*, 383 U.S. at 9 ("The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare. . . ."); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517,

524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."); *Feist*, 499 U.S. at 349-50 (stating that the "primary objective of copyright" is to promote public welfare); *Stewart v. Abend*, 495 U.S. 207, 224, 224-25 (1990) (noting the Copyright Act's "balance between the artist's right to control the work . . . and the public's need for access"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (noting the "careful balance between public right and private monopoly to promote certain creative activity"); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the limited monopoly conferred by the Copyright Act "is intended to motivate creative activity of authors and inventors . . . and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts"); *Goldstein v. California*, 412 U.S. 546, 559 (1973) (discussing Congress's ability to provide for the "free and unrestricted distribution of a writing" if required by the national interest); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors."). Moreover, as new mediums of expression arrive and the number of works produced increases, promoting public use and access to works becomes increasingly important. *Sony*, 464 U.S. at 443 n.23 ("[S]ince copyright protection is not perpetual, the number of audiovisual works in the public domain necessarily increases each year.").

II. The CTEA Prevents Works That Have Reached The End Of Their Proper Copyright Term From Entering The Public Domain

The CTEA single-handedly deprives our schools, libraries, and children of the benefits that digital archives offer. Because of both the retroactive and prospective extensions of copyright in the CTEA, a robust public domain remains outside of our grasp.

When one asks the leading experts on digital archiving "what is the single most significant barrier to preserving our cultural heritage?" one uniform answer resounds: intellectual property concerns. PANEL ON DIGITAL LIBRARIES, PRESIDENT'S INFORMATION TECHNOLOGY ADVISORY COMMITTEE ("PITAC"), DIGITAL LIBRARIES: UNIVERSAL ACCESS TO HUMAN KNOWLEDGE 21 (2001), *available at http://www.ccic.gov/pubs/pitac/pitac-dl-9feb01.pdf*; MICHAEL LESK, PRACTICAL DIGITAL LIBRARIES 223 (1997) ("Issues related to intellectual property law are the most serious problems facing digital libraries."). Until works reach the end of their term, it is simply impossible for librarians and archivists to seek rights from millions of copyright owners and prepare the works for preservation and access. The future of digital archives depends on a predictable and reasonable limit to copyright terms. Without "limited times," millions of historical and cultural works will be unavailable to the majority of the public and will continue to disappear in their original form. The ultimate dedication of these works to the public domain will be the promise that never comes due.

Consider some statistics. In the year 1930 10,027 books were published.[7] In 2001, all but 174 of these titles are out of print.[8] While a copy or two may exist in a library or a used bookstore, the copyright holders are not making these titles available to the public. But for the CTEA, digital archives could inexpensively make the other 9,853 books published in 1930

7. AMERICAN LIBRARY ANNUAL AND BOOK TRADE ALMANAC FOR 1872-1957 ("ALMANAC").

8. BOOKS IN PRINT ONLINE ("BIP"), *available at* http://www.bowker.com.

available to the reading public starting in 2005. But for the CTEA, they would now be available to hundreds and thousands of schools, researchers, and families. But for the CTEA, they would now be at the fingertips of new authors and artists, available to assist in forging the next generation of great literary works. Yet because the CTEA still stands, we must continue to wait, perhaps eternally, while works disappear and opportunities vanish.

With digital archiving, the public would stand a far better chance of accessing these "rare" books than works still under copyright but no longer made available by the copyright holder. For example, the Frank Capra movie, "It's a Wonderful Life" lay gathering dust in a movie studio until in the early 1970's when it fell out of copyright and was aired by Public Broadcast Stations. It quickly became a Christmas tradition on many stations and for many families.[9] But for its fall into the public domain this classic film would not have reemerged in the 1970s. Indeed, under the CTEA no one with an interest in showing the film would have been able to do so until 2041.

On its face, the CTEA merely extends the copyright term by 20 years. However, the central issue here is not simply the additional 20 years; it is the congressional policy of perpetual copyright. Congress has already extended the term of copyright *eleven times* in the 20th Century alone. LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 197 (2001). There is no reason to believe this time will be the last. Rather, it is far more likely that Congress will be pressured in 2018 to add still more term to works whose copyrights would otherwise expire.

The public domain is an essential component of the copyright jurisprudence of this Court and the lower courts. However, in *Eldred v. Reno*, 239 F.3d 372 (D.C. 2001), the District of Columbia Court of Appeals completely ignored the role of the public domain in copyright law as set forth within

9. Roger Ebert, *It's A Wonderful Life*, THE CHICAGO SUN-TIMES, *available at* http:www.suntimes.com/ebert/greatmovies/wonderful_life.html.

Art. I, § 8, cl. 8 of the Constitution. The Court of Appeals stated that Congress would exceed its power under the Copyright Clause if it made copyright protection permanent. But then, with a wink and a nod, it gave Congress the go ahead to perpetually extend copyright protection as long as each "extension" comes with a date certain. In holding that the introductory language of the Copyright Clause fails to impose *any* substantive limit on congressional power, and that said power is immune from First Amendment scrutiny, the Court of Appeals reduced the public domain to an illusion — a field forever tilled but never sown.

Without some check on Congressional power, it is unlikely that any of the cultural and historical works from the first half of this century will *ever* enter the public domain. Limits must be found. This Court must require Congress to respect the limitations of "promoting" and "limited times" or the public will never experience the value that digital archiving offers.

III. Digital Archives Breathe New Life Into The Public Domain

In the modern world of publishing, the public domain presents a thriving and vibrant area of learning and creativity. Far from the moldering books and deteriorating dusty film canisters of previous decades, today's collections can be digitally stored, accessed and distributed. This new global decentralized platform revolutionizes access and use of public domain works.

A. Digital Archives Allow Us To Preserve Our Cultural Heritage

1. Copyright Owners Fail To Preserve The Vast Majority Of Creative Works For Public Access

Millions of copyrighted works are created every year. In comparison, the number of works actually maintained and available to the public is quite small. Today, the number of volumes available for purchase in the US is a tiny fraction of the volumes published in the United States.[10] Amazon.com,

10. For example, in 1910, 13,470 books were published in the United States. ALMANAC. In 2001, only *180* of these titles are available

(Cont'd)

the world's largest online seller of books, lists only 2.5 million titles total in its online catalogue.[11] Libraries and archives preserve some of the books no longer for sale. However, public access to literary works under a system of physical archiving is fiscally and spatially constrained. The combined archives of public research libraries in the United States hold approximately 600 million titles total, a small percentage of the world's published works over the last 200 years.[12]

Every year, thousands of books, movies and sound recordings also move out of circulation and only a small number are preserved in libraries and private collections. Moreover, every year, physical decay and accidental loss (not to mention limited shelf and storage space) reduce the number of books actually available. This diminution of available copies applies equally to movies and sound recordings. James H. Billington, Librarian of Congress in 1994, stated:

(Cont'd)
for purchase from any publisher worldwide. BIP. The numbers for other decade years are similar: 1920 (8422 published, 307 in print in 2001); 1930 (10,027 published, 174 in print); 1940 (11,328 published, 224 in print); 1950 (11,022 published, 431 in print). *Compare* ALMANAC *with* BIP. The number of published books has dramatically increased, e.g. 1984 (57,087), 1995 (65,288), 1996 (57,132). BIP, *supra*. Thus, the number eventually lost to the public because of excessive copyright terms will be even greater in years to come.

11. Paul Chan, *Amazon Rebounds on Holiday Cheer But Skeptics Abound*, SINGAPORE BUSINESS TIMES, December 3, 2001 at SS2.

12. U.S. Department of Education. National Center for Education Statistics. Academic Libraries in the United States: Fiscal Year 1998, NCES 2001-341, by Margaret W. Cahalan, Natalie M. Justh, Mathematica Policy Research, Inc. and Jeffrey W. Williams, Project Officer, National Center for Education Statistics, Washington, D.C.: 2001. Table 5A. (Total number of paper volumes: 878,906,177; Total number of paper titles: 495,724,813; Total number of microform units: 1,062,082,077; Total number of electronic titles: 3,473,225, Total number of audio-visual materials-units: 92,305,707).

> Of America's feature films of the 1920s fewer than 20% survive; and for the 1910s, the survival rate falls to half that. But what is even more alarming is that motion pictures, both old and new, face inevitable destruction — old films from nitrate deterioration and newer films from color fading and the "vinegar syndrome." Only by storing films in low-temperature and low-humidity environments can nature's decay processes be slowed. The majority of American films, from newsreels to avant-garde works, do not receive this type of care and are in critical need of preservation.[13]

Even if a work, after a lengthy but presumably finite term, enters the public domain, the public may never enjoy it if few or no physical copies remain.

Like the D.C. Circuit, the Archive believes that "preserving access to works that would otherwise disappear . . . 'promotes Progress'." *Eldred*, 239 F.3d at 380. But the data rather starkly demonstrate that copyright holders lack an adequate incentive to preserve works. Despite the supposed incentives copyright offers to authors and publishers, today much of our cultural heritage lies fallow, withheld from the public domain by bloated copyright terms, and removed from the stream of commerce because copyright holders reap little profit from them. The truth is that by the time even the pre-CTEA copyright term expires, few books, movies, or music are being published for profit. Most copyright owners let their works fall out of print, leaving them in literary limbo.[14] Moreover, many owners of works from

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13. Redefining Film Preservation: A National Plan Recommendations of the Librarian of Congress in consultation with the National Film Preservation Board, Library of Congress Washington, D.C. (August 1994), *available at* http://www.loc.gov/film/plan.html.

14. It is worthy of note that the rights afforded to copyright owners under 17 U.S.C. § 106 do not address maintenance of works. Therefore, it can be presumed that there are few if any incentives for copyright owners to preserve works. That responsibility has been, and should be, left to our public libraries and archives as guardians of the public domain.

95 years ago cannot easily be found, especially when the license is for small or non-profit projects.

The benefits of our entire cultural heritage are forestalled while copyright holders derive profit from a relatively small number of works. For some works, extending the period between their decline in profitability and their entry into the public domain is more than just a delay — it is abandonment. For works recorded on film and other less stable mediums, for example, the CTEA extension threatens to lock them up past the time when they can be truly preserved. If the CTEA stands, the public's share of the copyright bargain, in many instances, will literally blow away on a breeze. The only way to revive these works is to let them reach the natural end of their term so that they fall squarely into the public domain. Once there, digital libraries and archives can save these works for future generation's attention and adoration.

2. Digital Archives Preserve Copyrighted Works and Prevent Their Permanent Loss

Digital archives offer a solution to the problem of preservation.[15] Films, books, and sound recordings that enter the public domain can be archived quickly, efficiently and cost-effectively via digitization so that no further deterioration or loss will ever occur. Digitizing a film, a book, or a sound recording makes a perfect copy of the work and saves that copy on a computer-compatible medium, such as a hard drive or a CD-ROM. Once the first copy is made, further copies can be rendered as backups in order to prevent loss or accidental destruction. These copies can exist in multiple locations preventing a catastrophe such as the great fire in Alexandria from destroying our heritage.

Our culture is exploding off the printed page into film, video, and sound. The world produces between one and two exabytes (a billion, billion bytes) of information each year.[16]

15. Amicus Archive strongly believes that to the extent possible, works should be preserved in both physical and digital forms.

16. Peter Lyman and Hal R. Varian, *How Much Information*, Executive Summary (2000), *available at* http://www.sims.berkeley.edu/how-much-info.

Only a tiny percentage (0.003) of this creativity takes the form of a printed page.[17] The vast majority of this information takes the form of sound, images, and numeric data.[18] With each passing day it becomes increasingly important that our libraries have the ability to collect and store these formats. Without digital archiving, the increasing cost and diminishing opportunity to preserve these works will nullify our efforts to save them for future generations. Utilizing currently available digital technology, we can build comprehensive collections that capture media works in their most pristine forms and preserve them forever.

Librarians and archivists throughout history have been the stewards of our cultural history. The passage of the CTEA does not change authorial incentives in support of preservation. Instead, it keeps creative works from librarians and archivists who armed with new technology stand ready to preserve them *all*.

B. Digital Archives Promote Full Public Access To Our Cultural Heritage

Digital archives hold out the promise of universal access to our cultural heritage. Today's libraries provide free public access for some people to some of this heritage. However, any single physical library can contain only a small fraction of humanity's cultural artifacts[19] and primarily serves its proximate community. In contrast, the Internet — the dominant platform for access to digital archives — provides relatively unlimited low cost capacity to support both the archiving of, and universal access to, traditional printed works, as well as audio, video, and still images. Internet-based digital archives are the true embodiment of the public domain.

17. *Id.*

18. *Id.*

19. United States public libraries contain approximately 784,562,000 volumes. Department of Education. National Center for Education Statistics. *Public Libraries in the United States: Fiscal Year 1998*, NCES 2001-307, by Adrienne Chute, Elain Kroe, National Center for Education Statistics, Washington, D.C. 2001. Table 7.

As this Court explained in *Reno v. ACLU*, the Internet is comparable to "a vast library including millions of readily available and indexed publications." *Reno v. ACLU*, 117 S. Ct. 2329, 2335 (1997). The Internet "was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world." *ACLU v. Reno*, 929 F. Supp. 824, 836 (E.D. Pa. 1996) (finding of fact #34), *aff'd*, 117 S. Ct. 2329 (1997). Just as this platform has lifted so-called "public records" out of "practical obscurity" and provided the fodder for controversial new products and services, it offers the chance to bring the creative works housed in the stacks and files of our libraries and archives to the public on a scale that heretofore seemed unimaginable.

As mentioned above, millions of copyrighted works are created every year, yet, after 75 years, few remain in circulation. Most books are out-of-print; many movie reels and recordings are lost or damaged.[20] Yet, even where archives store the few remaining physical copies of works, they provide only limited access: limited by geography, time, and form. Only a small minority of the public has the time and resources to access the bulk of our cultural heritage. For a large segment of the public, especially those in rural and remote locations and those searching for material on a tight timetable, our cultural reserves are essentially out of reach.

For example, Prelinger Archives in New York and San Francisco maintains over 48,000 ephemeral films relating to American life, culture, and industry, many of which have important historical and cultural value. The public can access this physical archive, but only through two very limited means: (1) designated representatives for stock footage licensing, i.e. Archive Films and Getty Images and (2) "access events" such

20. *Supra*, notes 7-13 and accompanying text. *See also* Redefining Film Preservation, *supra* ("The key conclusion of Film Preservation 1993 is that motion pictures of all types are deteriorating faster than archives can preserve them. Film is a fragile medium, intended for brief commercial life. . . .").

as academic and scholarly screenings, research visits to the archives and the provision of videotape copies. Every time a physical copy of a film is viewed, the quality of its print suffers slightly. Thus, while Prelinger Archives serves as a fine example of physical preservation, its fixed locations and limits on simultaneous use of films impede full public access. And the analog nature of the film means that what public access can occur slowly consumes the very film that is being viewed.

Digital archiving, on the other hand, eliminates many of these barriers and makes our vast resources available to almost anyone who wishes to use them.[21] Information on the Internet while frequently stored in one geographic location is readily accessible to individual regardless of their location, or the hour of the day.

The power of digital archives is demonstrable. The Archive recently borrowed 1,001 key public domain archival films from Prelinger, films that were found to be most in demand, plus unknown films that experience suggested people would want to work with and see. These films were transferred to videotape and then digitized so they could be stored and served online at *http://www.moviearchive.org*. In September and October 2001 alone, these movie files were downloaded over 1 million times from moviearchive.org, with many of these downloads performed by users from educational institutions some distance from New York or San Francisco. By contrast, in the entire year 2000, the public only accessed approximately 2,000 physical film clips through Prelinger's designated representatives and held approximately 200 physical access events. In other words, by removing the barriers of time and distance digital access allowed the public to view Prelinger's films over 2,700 times more often than physical access.

Digital archives can bring the public domain into schools, libraries, and homes across the globe. Indeed, for most works, it is *only* digital archives that can do so.

21. Panel on Digital Libraries, President's Information Technology Advisory Committee ("PITAC"), Digital Libraries: Universal Access to Human Knowledge 21 (2001) page 2, *available at http://www.ccic.gov/pubs/pitac/pitac-dl-9feb01.pdf*.

C. Digital Archives Support Rich And Diverse Use Of Our Cultural Heritage

Digital archives foster new and innovative use of works in the public domain. For the Prelinger collection, transition to digital format brought not only quantitative, but also qualitative changes in patron access. The Director of Prelinger Archives stated that the dramatic increase in access through moviearchive.org represents many different kinds of access, many of which were previously impossible. Such accesses include public screenings, classroom screenings, individual scholarly research projects, and low-budget productions.[22] Very few if any of these users would have been able to access the archives previously, according to Prelinger.

Digital archives offer academics and cultural inquisitors more than simple access to previously unavailable works; they also offer the opportunity to exploit highly efficient and productive search tools. For example, the Library of Congress ("LOC") preserves a collection of nearly 121 million items, more than two-thirds of which are in media other than books. These include the largest map, film and television collections in the world. It would take days if not weeks for most people to physically search through even the index to its collection, assuming one was able to make the trip to our nation's capital. Yet, now, with access to a computer, web browser, and the Internet, one can simply go to www.loc.gov and search their catalogue within minutes.

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22. Issues of accessibility are particularly important in education. Students, researchers, and teachers are constantly looking for material to use in their presentations, projects, and assignments. Where better to turn then a well-organized digital archive of works that represent our history? The older the work, the more valuable an educational tool it is. Consider, for example, the works of Shakespeare. Any copyright on his works would have long passed; now they are among the most abundant sources of inspiration and insight in modern education (next to the Bible, another work that has been rescued and preserved within the public domain).

Yet often searching the LOC catalogue is insufficient. Many answers within an item lie beyond its title, author or abstract, especially for media other than books. Imagine, however, if one could search the actual *contents* of the LOC collection, i.e. the words on the pages, the images on the films, or the sounds on the recordings, from one's home, school, or office computer. Such technologies are either currently available or quickly developing. For example, products such as Adobe Acrobat have the capacity to perform Optical Character Recognition ("OCR"), a process by which the program will take a digitized document, identify every word on each page of the document, and then allow the user to search the pages of the document for each and every occurrence of a word requested.[23]

Imagine now if 100 libraries around the country had a collection of a similar size to that of the LOC. Imagine that any child, student, philosopher, reporter, or scholar could simply go to any one of these 100 sites from his or her home or work computer, search for documents in the public domain, and then search and view those documents within a matter of minutes. Imagine that those who are blind or deaf can use tools that translate these works into a format that meets their needs. Further, imagine that individuals in other countries have the tools to translate these works into their native tongue in real-time. Think of the difference it could make in bringing our cultural heritage to the public and educating the populace. Where technology and imagination lead us the CTEA forbids us to go. For our children, high quality access to digital information demands a robust public domain.

D. Digital Archives Extend Our Cultural Heritage

Beyond preservation and accessibility digital archives provide the public with unprecedented opportunities to use our cultural heritage as the creative basis for the next generation of artistic and informative works. The ability to digitize vastly increases the capacity to incorporate our history and culture into new works.

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23. For more information on OCR Technology, *see* http://www.adobe.com/products/acrcapture/fullfeature.html.

Having access to digital copies of works allows new authors to maximize and extend the value of preserving our past publications. Unlike physical media, digital media allows the average individual to easily quote and cite movies, by clipping and sampling. Such quotation and citation not only augment the quality of scholarly work but also reintroduce older works into the present-today popular consciousness.[24]

This ability is made more important — and more powerful — as audio and visual recordings flourish. One can allude to or reference a printed work by quoting a short passage or citing to the publication. Visual and auditory media, however, present a far more complex arena for allusion and citation. If one wishes to reference a visual image, it is often necessary, if not essential, to show that image within one's own work. A slideshow cannot "cite" or "quote" a photo from a rally; a song cannot "cite" or "quote" a speech by a political candidate. Digital archives allow written, audio and visual works to be easily sampled and "cited."

Recently, the Archive held a filmmaking contest.[25] It asked amateur filmmakers around the world to create a short film of less than 10 minutes showing a perspective on an historical event associated with war. The films could be true stories, parodies or fiction. In creating these films, the Archive asked filmmakers to limit their resources to free content found in archives across the Internet, including the 1,001 films of the Prelinger Archive stored at moviearchive.org. The submissions each incorporated a powerful message about war and our society. These new creative works were built exclusively through the use and reuse of public domain digitized film.[26] Submissions came in from a fifth grade class in a District of Columbia public school and an individual in Finland. Such commentary, from such creators,

24. Businesses recognize the value of their corporate heritage for developing their message and image today. They too are creating digital archives of their creative works. *See* Allison Fass, *Online Archive for Coke Advertising*, N.Y. TIMES, December 10, 2001.

25. http://ftp.archive.org/html/contest01/contest.htm

26. To view the winning film as well as the other submissions, *see* http://ftp.archive.org/html/contest01/gallery.htm

would not have been possible without the advent of digital film archiving.

E. Digital Archives Make Preservation and Access More Economical

Digital archiving is not free. Nor is it even inexpensive. Yet because we only need a single digital copy of a work to preserve it in perfect condition for a virtually unlimited duration and for universal use, digital archives make preservation and enhanced access realistic and cost effective.

For example, the costs for physically preserving a single color feature film by copying can run to $40,000 or more, and the short lifespans once thought to be a problem only for nitrate now confront nearly all films.[27] By contrast, the entire cost of digitizing a film is $200 per hour of footage.[28] It is a single fee, paid once per film per lifetime. Once digitized, the cost of storing, maintaining, transmitting and making back up copies of the film approaches zero.[29] Digital files can be maintained, transferred, and backed up automatically by current software without human intervention. Digital archives will cheaply and efficiently save millions of works from dereliction and destruction.

But the return on digital archiving is higher still. Federal and state governments continue to spend taxpayer funds to "wire" our schools, libraries, and community centers — to connect them to the Internet.[30] As a nation we have made a

27. http://www.loc.gov/film/plan.html, § 3, ¶ 3.

28. Experience of Internet Archive, interview with Brewster Kahle.

29. The cost estimates for maintaining a digital book range from Michael Lesk's low of $4 to the National Archives and Records Administration (NARA) estimate of $13.99 to Yale University's estimate of $15.37 to the EPA's estimate of $250 per book. *See* Digital to Microfilm Conversion, *Table 6: Estimates for Archiving a Digital Book for 10 years, available at* http://www.library.cornell.edu/preservation/publications.html.

30. For example, the Universal Service Fund for Schools and Libraries-commonly known as the "E-Rate" program created in 1996 as part of Public Law 104-104, the Telecommunications Act of 1996, (Cont'd)

commitment to provide a broad swathe of the public with access to this new platform for communication, research, and publishing. But to what have we provided access to? If the CTEA stands it will not be the wealth of information and knowledge housed in our cultural institutions. For the rest of this century the public's treasures will remain offline and out of reach. We will have given our children the keys to this library, but they will enter only to find empty shelves.

CONCLUSION

Digital archives constitute the difference between a nominal public domain and a real, robust public domain. Their creation depends on "limited times." Digital archives are ready to serve the needs of children, researchers, and the public. But they will never get that chance unless Congress is prevented from making copyright protection perpetual. Amicus Internet Archive respectfully requests this Court to grant certiorari in this case and thereafter enforce the public's right to preserve its heritage by striking down the CTEA as an unconstitutional extension of the copyright term beyond the enumerated powers given to Congress by the United States Constitution.

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provides discounts on the cost of telecommunications services, including Internet access, and equipment to all public and private schools and libraries.

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICI CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

INTEREST OF AMICI CURIAE[1]

Eagle Forum Education & Legal Defense Fund (Eagle Forum ELDF) is an Illinois nonprofit corporation organized in 1981. Eagle Forum ELDF s mission is to enable conservative and pro-family men and women to participate in the process of self-government and public policy making so that America will continue to be a land of individual liberty, family integrity, and respect for the United States Constitution. One of the ways Eagle Forum ELDF performs these functions is through filing *amicus curiae* briefs in this Court and in the federal circuit courts of appeals. It thus has a significant in-

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

terest in the treatment of arguments by *amici* by this Court and other federal courts. Eagle Forum ELDF also has a significant interest in striking the retroactive provisions of the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) as an overreaching by Congress beyond the limitations imposed by the Copyright Clause and the First Amendment.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato s Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs, including *amicus* briefs in the federal courts of appeals and this Court. The instant case raises squarely the question of the role of *amici* in the federal courts and thus is of central interest to Cato and the Center.[2]

SUMMARY OF ARGUMENT

This case raises important issues regarding the constitutional constraints upon Congress s copyright powers that have divided the courts of appeals. It also involves a significant and frequently-occurring issue regarding the role of *amici curiae* that impacts the administration of justice and likewise has divided the courts of appeals. In the course of rejecting petitioners position on the constitutional issues presented, the D.C. Circuit refused to consider additional arguments presented by *amici* in support of petitioners on those same issues, and thereby eliminated any role for *amici* solely because

[2] Cato joins Parts I & II of this brief regarding the role of *amici* in the courts of appeals, but takes no position on the merits of the First Amendment and Copyright Clause issues discussed in Parts III & IV.

those arguments had not been made or adopted by the parties in this case. That limitation on the role of *amici*, however, is contrary to Federal Rule of Appellate Procedure 29, every Local Rule that addresses the content of *amicus* briefs, and the approach taken by this Court and six circuit courts of appeals. Rule 29 and the majority of courts disfavor repetitive arguments by *amici* and affirmatively encourage *amici* to raise new legal arguments not raised by the parties. The approach now adopted by the D.C. Circuit and used in three other circuits, however, turns the role of *amici* on its head and harms the administration of justice by allowing the creation of precedent based on incomplete or erroneous constructions of law that will have impact far beyond the parties themselves.

Regarding the constitutional questions presented by the petition, the decision below is wrong on both textual and structural grounds. The First Amendment imposes a constraint on Congress copyright power that is not limited to, or satisfied by, copyright s idea/expression dichotomy. Particularly where new statutory provisions increase the burden on speech, traditional First Amendment scrutiny is appropriate for such provisions. The D.C. Circuit s categorical rejection of the First Amendment challenge to retroactive extension of copyrights thus is inconsistent with the limitations placed by the First Amendment on all exercises of Article I powers. The court s interpretation of the Copyright Clause also is inconsistent with the Constitution, rendering superfluous the very definition of Congress power To promote the Progress of Science. Unconditional retroactive extension of existing copyrights does not promote progress at all, and effectively eliminates the requirement that copyrights be granted only for limited Times.

ARGUMENT

I. THE DECISION BELOW IS IN THE MINORITY OF A 6-4 CIRCUIT SPLIT REGARDING THE ROLE OF *AMICI*.

Federal Rule of Appellate Procedure 29(a) provides that a non-governmental *amicus curiae* may file a brief * * * if the brief states that all parties have consented to its filing. Despite this express authorization to file an *amicus* brief where all parties have consented (as in this case), there is a circuit split over whether a court of appeals must consider supplemental arguments by *amici* that are relevant to the issues on appeal when the parties have not likewise made the same arguments to that court. The D.C. Circuit in this case takes the minority view that such supplemental arguments are not properly before the court.

At least six circuits will consider supplemental arguments raised by *amici* that are not also made by the parties on appeal. *See Massachusetts Food Ass n* v. *Massachusetts Alcoholic Beverages Control Comm n*, 197 F.3d 560, 567 (CA1 1999) (finding no need to allow intervention in order to raise new legal arguments because a court is usually delighted to hear additional arguments from able *amici* that will help the court toward right answers), *cert. denied*, 529 U.S. 1105 (2000); *Samuels, Kramer & Co.* v. *CIR*, 930 F.2d 975, 986 & n. 9, 988-990 (CA2) (considering argument by *amicus* regarding a phrase in Appointments Clause even though party relied upon different language and expressly rejected reliance on language argued by *amicus*), *cert. denied*, 502 U.S. 957 (1991); *New Castle County* v. *National Union Fire Ins. Co.*, 243 F.3d 744, 754 (CA3 2001) (noting that [o]f the three briefs submitted in this case, only the *amicus* attempts a public policy argument, and addressing that argument); *United States* v. *Matthews*, 209 F.3d 338, 344 n. 3 (CA4) (addressing the merits of an argument expressly eschewed by the party at oral argument but raised by one of his *amici*), *cert. denied*,

531 U.S. 910 (2000); *Bridges* v. *City of Bossier*, 92 F.3d 329, 335 n. 8 (CA5 1996) (allowing argument first raised by *amicus* but which had not been argued by appellant in the district court or in his initial brief on appeal, and *citing Corrosion Proof Fittings* v. *EPA*, 947 F.2d 1201, 1208 (CA5 1991), for the proposition that the court can consider different arguments raised by *amicus curiae* on issues raised by appellant), *cert. denied*, 519 U.S. 1093 (1997); *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1330-31 (CA11 1999) (addressing on the merits different arguments from *amici* on a takings question).

Contrary to that wide acceptance of new *amicus* arguments on existing issues, however, the D.C. Circuit in this case held that it would not consider an argument by *amicus* relating to the proper construction of the Copyright Clause and to the circuit s erroneous precedent on the matter because it claimed that the argument is rejected by the actual parties to this case and therefore is not properly before the court. Pet. App. 11a. The court further claimed that because the plaintiffs conspicuously failed to adopt the argument of the *amicus*, the Government was not alerted to any need to argue this point and did not do so. *Id.*; *see also id.* at 16a (argument made by *amicus* may only be considered in a future case in which a party to the litigation argues the point); *id.* at 25a (opinion on rehearing) (even viewing the issue broadly, we would still not reach what would then be the supporting argument of the *amicus*); *id.* at 26a (because the plaintiffs-appellants did not take the same tack as the *amicus*, the Government did not on brief address the district court s interpretation of this court s decision in *Schnapper*).

Three other circuits similarly will not consider supplemental arguments on appeal by *amici* unless the parties have likewise made the same argument. *See National Comm n on Egg Nutrition* v. *FTC*, 570 F.2d 157, 160 (CA7 1977) (holding that because *amicus* argument was not made before the FTC or even by the petitioners themselves in this court [it] is

therefore not properly before us), *cert. denied*, 439 U.S. 821 (1978); *Swan* v. *Peterson*, 6 F.3d 1373, 1383 (CA9 1993) (holding that while new *amicus* arguments may be allowed on limited subjects, such as jurisdiction, that could be raised *sua sponte*, because the parties did not adopt *amicus* argument by reference in their brief and none of the other exceptions apply, it would not consider the argument by *amicus*), *cert. denied*, 513 U.S. 985 (1994); *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (CA10 1997) (declining to consider argument by *amicus* where party did not adopt *amicus* argument by reference in his brief and the exceptions listed by the Ninth Circuit in *Swan* did not apply).

The broad circuit split regarding whether supplemental *amicus* arguments not expressly adopted by the parties may be considered by the courts of appeals should be resolved by this Court. That issue is significant not just to matters of local circuit administration, but to the proper construction of the Federal Rules of Appellate Procedure and to the administration of justice in general.

II. RESOLVING THE CIRCUIT SPLIT REGARDING THE ROLE OF *AMICI* IS IMPORTANT TO THE PROPER ADMINISTRATION OF THE JUDICIAL SYSTEM AND THE FEDERAL RULES OF APPELLATE PROCEDURE.

Amici curiae, particularly at the appellate level, play an important role in the administration of justice. As cases move higher up in the judicial system, their effective impact rapidly expands beyond the particular parties or the local district, and encompasses persons in multiple states and throughout the country as a whole. That expanding impact is particularly noticeable in the D.C. Circuit, where the court often rules on nationwide programs and sets precedent with impact far beyond its geographic borders. Given the reach of such decisions, it is important that courts of appeals remain open to consideration of all legal *arguments* relevant to the resolution of *issues* properly before them.

The split in authority regarding the role of *amici* is especially troubling because the minority view excluding new *amicus* arguments is contrary to the Federal Rules of Appellate Procedure. As noted above, *amici* having the consent of the parties need no further authority to file their briefs. Their right to file in such circumstances is provided directly by the Federal Rules.

When adopted in 1967, Rule 29 regularized the treatment of *amicus* briefs, which previously had been regulated by local rule in only five circuits. The new Federal Rule followed the majority practice in the circuits by requiring leave of court to file an *amicus* brief, except under the circumstances of filing by certain government entities or filing with consent of the parties. 1967 Adv. Comm. Note to Fed. R. App. P. 29.[3]

The 1998 amendments to Rule 29 made a number of substantive changes that clarified the role of *amici* under the Rules. In discussing a new requirement that an *amicus* seeking leave to file from the court state the relevance of the matters discussed in its brief, the Advisory Committee clarified the role of *amici* by quoting from Supreme Court Rule 37.1:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus curiae* brief which does

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[3] Federal Rule of Appellate Procedure 2 provides that a court of appeals may to expedite its decision or for other good cause suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b). The primary purpose of this rule is to grant power to courts of appeals to expedite the determination of cases of pressing concern to the public or to litigants by prescribing a time schedule other than that provided by the rules and to relieve litigants of the consequences of defaults under the rules where manifest injustice would otherwise result. 1967 Adv. Comm. Note to Fed. R. App. P. 2. Neither circumstance is relevant to this case or to the general issue of whether a court must consider different arguments timely presented by *amici* on the issues presented in a case.

not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

1998 Adv. Comm. Note to Fed. R. App. P. 29, subd. (b).

The clear expectation is that *amici* in the courts of appeals, no less than in the Supreme Court, will say something new something not already said by the parties and that significant overlap between the arguments of the parties and the *amici* would be considered a burden on the courts. That expectation is confirmed by the shorter page limits for *amicus* briefs provided in the 1998 amendments. As explained in the Advisory Committee Notes, such shorter limits are appropriate because an *amicus* brief is supplemental and should treat only matter not adequately addressed by a party. 1998 Adv. Comm. Note to Fed. R. App. P. 29, subd. (d).

The propriety of supplemental arguments also is reflected in the requirement that the brief must be filed no later than 7 days after the principal brief of the party being supported is filed, unless the court grants leave for later filing. Fed. R. App. P. 29(e). As explained by the Advisory Committee, the 7-day stagger was adopted because it is long enough to permit an *amicus* to review the completed brief of the party being supported and avoid repetition argument. 1998 Adv. Comm. Note to Fed. R. App. P. 29, subd. (e). The stagger is sufficiently short so that the opposing party will have sufficient time to review arguments made by the *amicus* and address them in the party s responsive pleading. *Id.*

Most circuits have found it unnecessary to supplement the Federal Rules concerning the nature of *amicus* participation. Four circuits, however, have confirmed through local rules the essential point that *amici* are expected to make new arguments, not merely echo the parties. The D.C. Circuit, for example, has the most forceful reiteration of this basic point, requiring that an *amicus* brief must avoid repetitious of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and focus on points not made or

adequately elaborated upon in the principal brief, although relevant to the issues before this court. D.C. Circuit Rule 29. Local Rules from three other circuits are to similar effect.[4]

Moreover, this Court itself has considered arguments and even *claims* raised on appeal only by an *amicus*. In *Teague* v. *Lane*, 489 U.S. 288, 300 (1989), this Court addressed a retroactivity argument notwithstanding that [t]he question of retroactivity with regard to petitioner s fair cross section claim has been raised only in an *amicus* brief. Likewise, in *Mapp* v. *Ohio*, 367 U.S. 643, 646 n. 3 (1961), this Court noted, in the course of overruling prior precedent, that [a]lthough appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled, the *amicus curiae* * * * did urge the Court to overrule *Wolf*. *See also Florida v. J.L.*, 529 U.S. 266, 272 (2000) (addressing the merits of a separate *amicus* argument on the reliability of a tip); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395 n. 7 (2000) (addressing the merits of an *amicus* argument that contribution limits were insufficiently narrow for First Amendment purposes in light of other means of addressing the harms alleged); *Montana* v. *Egelhoff*, 518 U.S. 37, 46-48 (1996) (considering the merits of *amicus* alternative theory of a due process violation). Given that Rule 29 is expressly modeled on this Court s own

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[4] *See* Third Cir. Local App. R. 29.1 (for *amicus* briefs on rehearing: Before completing the preparation of an *amicus* brief, counsel for an *amicus curiae* shall attempt to ascertain the arguments that will be made in the brief of any party whose position the *amicus* is supporting, with a view to avoiding any unnecessary repetition or restatement of those arguments in the *amicus* brief.); Fifth Cir. Local R. 29.2 (an *amicus* brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed in those briefs); Ninth Cir. R. 29-1, Cir. Adv. Comm. Note (Movants are reminded that the court will review the *amicus curiae* brief in conjunction with the briefs submitted by the parties, so that *amicus* briefs should not repeat arguments or factual statements made by the parties.).

Rule 37, the practice of this Court is instructive on the proper interpretation of Rule 29 in the courts of appeals.

Federal Rule of Appellate Procedure 29 provides a uniform rule that contemplates significant and non-redundant participation by *amici curiae*. Alternative legal arguments on existing issues fit precisely within the purpose of that Rule. The approach taken by the D.C. Circuit, however, effectively destroys the role of *amici*, or forces them to do exactly what the rules declare they should avoid merely repeat or embellish the arguments already made by the parties. As Judge Sentelle correctly noted in his dissent from the panel decision, *amicus* in this case did precisely what was required of it in avoiding repetition of facts or legal arguments already made, and its supplemental arguments should have been considered fully on the merits. Pet. App. 22a. By refusing to consider those arguments, the D.C. Circuit s decision effectively eliminates any role for *amicus curiae* in the practice of the circuit. *Id.* at 28a (Sentelle, J., dissenting from the denial of rehearing *en banc*).

> If allowed to stand, this holding will effectively bar future *amici* from adding anything except possibly rhetorical flourish to arguments already outlined and embraced by the parties. This is particularly the case for those *amici* who, true to their traditional role as friends of the court, operate independently to assist the Court in its determinations.

Id. at 31a. Because Federal Rule 29 eschews such a useless and court-burdening role for *amici*, and because the circuits are split over this important question for the administration of the appellate courts, this Court should grant the petition and re-establish the uniform and sensible approach contemplated by Rule 29.

III. The First Amendment Conflict Should Be Resolved Promptly Due to the Nationwide Chill Created by the CTEA and the Decision Below.

The D.C. Circuit below held that copyrights are categorically immune from challenges under the First Amendment. Pet. App. 6a. As petitioners correctly note, such a categorical exclusion of Congress copyright power from First Amendment scrutiny conflicts with the approach adopted by the Eleventh Circuit. *See* Pet. 22-23 (discussing *CBS Broadcasting, Inc.* v. *EchoStar Communications Corp.*, 265 F.3d 1193 (CA11 2001)). Because much of the confusion in this area is a function of potentially ambiguous guidance from this Court in *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), it will not be resolved until this Court clarifies the constitutional truism that all of Congress enumerated powers are subject to, and constrained by, the First Amendment.

In *Harper & Row*, this Court addressed the situation where the defendant effectively arrogated to itself the right of first publication. 471 U.S. at 549. This Court quoted with approval the statement that copyright s idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author s expression. *Id.* at 556 (citation omitted). That statement, unfortunately, has been taken to mean that so long as the idea/expression dichotomy is in place, no other aspect of copyright law is subject to First Amendment scrutiny. Such an extreme conclusion, however, goes too far. To say, in the context of the first-publication right in *Harper & Row*, that copyright may protect expression without violating the First Amendment is a far cry from saying that the First Amendment allows *any* form of restriction to be placed on expression rather than ideas. And, indeed, this Court did not make such a sweeping ruling. Rather, it merely rejected a

reading of the First Amendment that would effectively destroy any expectation of copyright protection in the work of a public figure, *id.* at 557, and thus completely override core aspects of the copyright power. That this Court took the time to note copyright s positive effects on First Amendment values in the context of that case, *id.* at 559, actually demonstrates the propriety of a targeted First Amendment analysis rather than simply applying a categorical rule excepting all copyright restrictions on expression from First Amendment scrutiny.

While the exercise of the copyright power will, in many instances, survive First Amendment scrutiny, the provisions of the Copyright Act in general, and each new expansion of that Act in particular, are nonetheless subject to such scrutiny and the survival of each added speech restriction is not preordained. The establishment of fair use, first as a judicial doctrine and then as a statutory rule, illuminates that point. As the Eleventh Circuit recently observed in *Suntrust Bank* v. *Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (CA11 2001), prior to 1976, fair use was a judge-made right developed to preserve the constitutionality of copyright legislation by protecting First Amendment values. In 1976, however, Congress amended the Copyright Act and effectively increased its restriction on speech by eliminating the requirement that authors publish their works in order to receive copyright protection. The statute, however, also codified fair use as a limitation on copyright. Had fair use not been recognized as a right under the 1976 Act, the statutory abandonment of publication as a condition of copyright that had existed for over 200 years would have jeopardized the constitutionality of the new Act because there would be no statutory guarantee that new ideas, *or new expressions* of old ideas, would be accessible to the public. *Id.* (emphasis added). Notwithstanding the idea/expression dichotomy, therefore, the newly restrictive aspect of the 1976 Copyright Act was saved from likely con-

stitutional infirmity by an independent accommodation of the First Amendment interests threatened.

The latest restriction added to the Copyright Act a retroactive twenty-year extension of existing monopolies should likewise be considered separately from past endorsements of the Act in order to see whether such new restriction can survive the First Amendment or whether the burden on speech exceeds the trivial and speculative benefit alleged by the government. When conducting such review, it is important to keep first principles firmly in mind.

As this Court has recently reiterated in another context, Article I powers do not supersede restrictions created by Amendments. *See, e.g., Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 635-36 (1999) (provision that [a]ny State * * * shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court * * * for infringement of a patent was unconstitutional, in part because Congress may not abrogate state sovereign immunity pursuant to its Article I powers). Rather, Amendments to the Constitution narrow congressional authority that would otherwise exist under Article I standing alone. The First Amendment question is whether government action is unconstitutional *despite* Congress enumerated power. The constitutional hierarchy is no different in the case of copyright law. A law within Congress s copyright power may *still* be prohibited by the First Amendment.

Once it is conceded that the First Amendment is indeed a restraint on the copyright power, it is not enough simply to rely upon the idea/expression dichotomy, particularly as new restrictions are added to the Copyright Act. The notion that copyright only restricts particular expression, not the underlying ideas, and hence is not subject to further First Amendment scrutiny, is mistaken. The First Amendment protects not only the conveyance of concepts generally, but the particular form

of expression as well. It generally is left to the speaker to decide not merely what to say, but also how to say it, and the First Amendment protects the intangible value associated with a particular expression independently from the underlying idea.[5] Indeed, in the case of music and much poetry and art, there may not be much of an underlying idea at all beyond the descriptive beauty conveyed through the particularized expression. Yet such work is protected by the First Amendment as well as by copyright, and the idea/expression dichotomy is insufficient to accommodate the First Amendment interests at stake.

With Congress having retroactively redrawn the balance between the public domain and private authors, this Court should balance anew the First Amendment considerations implicated by that retroactive change. The gain from such an extension does not involve any *addition* to the incentive for authors to create new work, but rather involves only the pure speculation that the unconditional extension might encourage some authors to preserve existing works that they had not bothered to preserve during the existing term of their copyright. But an additional twenty years of retroactive monopoly is a significant burden on First Amendment values. The extension will hinder access to numerous works that would soon enter the public domain and that need no additional incentive for preservation. And the CTEA will chill the public use of works having uncertain status or whose authors are not readily located because few persons will risk the criminal penalties for unauthorized use of such works.

Given the ongoing and irreparable burden on petitioners and the public s First Amendment rights, this Court should grant the petition for certiorari in this case rather than wait for

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[5] The government could not, consistent with the First Amendment, restrict publication of works by Plato or Marx on the theory that the ideas could still be conveyed through other expression.

further cases that may be exceedingly slow in developing due to the chill imposed by the CTEA.

IV. THE COPYRIGHT CLAUSE LIMITS CONGRESS POWER TO PROMOT[ING] THE PROGRESS OF SCIENCE.

Petitioners correctly argue that the decision below warrants review because its erasure of the promote the Progress language from the Copyright Clause conflicts with the construction of that Clause by this Court and by other circuits. *See* Pet. 12-17. By unmooring the grant of exclusive rights from the very power that such grants were meant to support, the court below has done great damage both to the Copyright Clause and to the notion of limited and enumerated powers.

On the merits, the decision below misconstrues the Copyright Clause and largely ignores the arguments made by *amicus*. Despite recognizing petitioners argument that the limited Times requirement is informed by the goal of promot[ing] the Progress of Science and useful Arts, Pet. App. 4a, the D.C. Circuit nonetheless refused to rule upon the argument by *amicus* Eagle Forum ELDF that the promote the Progress language of the Copyright Clause defines, and therefore delimits, congressional power in this area as promot[ing] the Progress of Science. The structure of the clause defines a power to do X by means of Y. In the case of the copyright power, X to promote the progress of science is not a superfluity; it *is* the power granted to Congress. The remainder of the clause by securing for limited Times, etc. is not an affirmative grant; it is a negative limit on the *means* by which the power [t]o promote may be exercised.

This Court has recognized the correct structural reading of Article I, section 8 in the context of the Patent Clause. In *Graham* v. *John Deere Co.*, this Court stated:

> The clause is both a grant of power and a limitation. This qualified authority * * * *is limited to the promotion of advances* in the useful arts. * * * The Congress in

> the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. * * * [A patent system] by constitutional command must promote the Progress of * * * useful Arts. *This is the standard expressed in the Constitution and it may not be ignored.*

383 U.S. 1, 5-6 (1966) (emphasis added). If patent laws must promote the Progress of * * * useful Arts, then surely copyright laws similarly must promote the Progress of Science, and Congress copyright power is limited accordingly.

Despite this seemingly self-evident construction of the Copyright Clause, the D.C. Circuit instead chose to rely upon its earlier decision in *Schnapper* v. *Foley*, 667 F.2d 102, 112 (CADC 1981), *cert. denied*, 455 U.S. 948 (1982), holding that the introductory language of the Copyright Clause does not limit this power. While petitioners had sought to work around *Schnapper* by arguing that the introductory language nonetheless must inform the construction of the limited Times language in the Copyright Clause, *amicus* took a more direct approach, arguing variously that *Schnapper* could be read more narrowly to allow the correct interpretation of the promote language, that *Schnapper* s language to the contrary was at best *dicta*, or that the case should simply be overruled *en banc* because the purported holding was plainly wrong. *See* Br. of Eagle Forum ELDF, at 6 & n. 3.

On the question of whether the CTEA in fact promotes the progress of science, retrospective extension of existing copyrights does nothing to induce the creation of additional writings and hence does not promote science. As for the D.C. Circuit s claim that such extension encourages the preservation of existing works, retroactive promotion of preservation does not constitute promotion of *progress*.[6] Progress in-

[6] The court below discussed this argument in the hypothetical, offering its advisory views on the topic despite refusing to consider and rule formally on the arguments of *amicus*. *See* Pet. App. 12a (*If* called upon to do so, therefore, we *might well* hold that the application of the CTEA to subsisting copyrights was a necessary and proper action promoting the progress of science) (emphasis added).

volves forward movement, advancement, and creation, whereas preservation involves the very different realm of stasis and avoidance of decay. *Compare* New Lexicon Webster s Dictionary 799 (1994) (Progress means forward movement, improvement, advancement), *with id.* at 792 (preserve * * * to keep up, maintain, prevent from ruin or decay). While preservation might *benefit* science or the public generally, authorizing the promotion of mere preservation would effectively nullify the word Progress and more broadly empower Congress to promote science *in toto*.

Furthermore, because the retroactive extension is not conditioned on any further action by copyright holders, there is no credible reason to believe that the extension will induce owners to preserve any works that they have, by hypothesis, already neglected for years. The CTEA thus does not promote progress or anything else because the connection between the given right and the supposed benefit is too attenuated and speculative. As this Court observed in *United States* v. *Morrison*, 529 U.S. 598, 615 (2000), reasoning that follows a but-for causal chain * * * to every attenuated effect implicating an enumerated power is unworkable if we are to maintain the Constitution s enumeration of powers. While it might be different if the retroactive extension were somehow conditioned on further acts of creativity, merely throwing monopoly rights at people in the attenuated *hope* they use them beneficially only mocks the constitutional enumeration.[7]

[7] It is highly doubtful whether Congress could grant a *new* copyright for the preservation of an existing work. Such a copyright would appear to violate the requirement of originality and the prohibition against removing works from the public domain. Yet that is precisely the effect of retroactively extending copyrights: Granting more years of exclusive rights in return for the hope of preservation of works that otherwise would enter the public domain in due course.

Handing Disney a gift of twenty more years on the copyright for Mickey Mouse, without even requiring that it convert the copyrighted material into a format that will be preserved *and available* for public use in the future, is not the promotion of progress, it is simply corporate welfare.

Finally, regarding the nature of the limited Times allowed for exclusive rights to writings, the approach taken below drains meaning from that language. The correct construction recognizes that the Copyright Clause s use of the plural Times matches the plural Writings and Discoveries, but that its use of the singular the exclusive Right suggests only a singular Time[] per each writing or discovery. That interpretation requires Congress to select a time and stick to it for copyrights already granted, though it could modify the Time[] prospectively as to any future copyright. It also has the benefit of avoiding the seriatim grant of supposedly limited copyright terms that could, as a practical matter, be repeated indefinitely. Under the approach endorsed by the D.C. Circuit, for example, the copyright on Mickey Mouse already has received two approximately twenty-year extensions, and the court of appeals suggests no legal principle that could prevent the next extension twenty years hence, or any other extension *ad infinitum*. Absent some theory limiting such repetition, the decision below renders the limited Times language meaningless.

Because the decision below eviscerates the enumerated limits on the copyright power, and because it conflicts with decisions from this Court and other courts of appeals, it warrants plenary review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF LAW LIBRARIES, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, DIGITAL FUTURE COALITION, MEDICAL LIBRARY ASSOCIATION AND SOCIETY OF AMERICAN ARCHIVIST IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief *amici curiae* in support of Petitioners is submitted by the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Digital Future Coalition, the Medical Library Association, and the Society of American Archivists ("*Amici*") pursuant to Rule 37 of the Rules of this Court. *Amici* urge that the Court grant the requested writ of certiorari and reverse the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

The **American Association of Law Libraries** is a nonprofit educational organization of over 5,000 members who respond to the legal information needs of legislators, judges, and other public officials at all levels of government, corporations and small businesses, law professors and students, attorneys, and members of the general public.

The **American Library Association** is a nonprofit educational organization of approximately 61,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries

The **Association of Research Libraries** is a nonprofit association of 123 research libraries in North America including university, public, government, and national libraries whose mission is to influence the future of research libraries in the process of scholarly communication.

The **Digital Future Coalition** is a forty-one member alliance of many of the nation's leading non-profit educational, scholarly, library, and consumer groups, as well as major

1. Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, made a monetary contribution to the preparation or submission of this brief. American University, Washington College of Law, Glushko-Samuelson Intellectual Property Clinic Students Christine Calareso, Lincoln Harris, Sheryl Rakestraw, and Timothy Tyre prepared this work under the supervision of Professor Ann Shalleck and Counsel of Record Professor Peter Jaszi.

commercial trade associations representing leaders in consumer electronics, telecommunications, computer, and network access industries.

The **Medical Library Association** is an educational organization of more than 1,000 institutions and 3,800 individual members in the health sciences information field.

The **Society of American Archivists** represents more than 3,000 individuals and 400 institutions and is the authoritative voice in the United States on issues that affect the identification, preservation, and use of historical records.

* * * * *

Amici are organizations whose members engage in practices such as preserving cultural heritage, providing educational materials, sponsoring research, digitizing materials, teaching our nation's youth, lending books, creating works, and facilitating better technologically-adapted schools. Because *amici* continuously face copyright issues, they support balanced copyright laws. Restrictive copyright laws adversely affect authors, artists, curators, archivists, historians, librarians, and readers—the creators, recorders, keepers, disseminators, and users of our culture. *Amici* submit this brief to assist the Court's understanding of the practical consequences of this unique case for large segments of the public.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the District of Columbia Circuit ("DC Circuit") erroneously held that Congress' grant of twenty additional years of copyright protection as set forth in the Copyright Term Extension Act (CTEA)[2] is constitutional.[3] The DC Circuit failed to recognize that Congress' act violates the constitutional language that empowers Congress to grant copyright protection for "limited times" as a means of

2. Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827.

3. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

"promoting" the arts and sciences.[4] This balance struck by the Framers consisted of giving incentives for cultural production through limited rewards to creators, while providing for an ever-growing arena of ideas and materials available for the public. Central to this balance was the public domain, whose importance has been denigrated by the enactment of the CTEA.

The public domain is a vast expanse of knowledge, experience and ideas embodied in artistic creations, including written works, audio files, movies, and photographs, as well as historical documents and archives, held in common for all people to access, enjoy, research, and use as inspiration for future creations. The public domain results from the Framers' skepticism toward monopolies and remains an integral part of the balance between the protection of works and promotion of knowledge. Historically, copyright legislation and this Court's jurisprudence have recognized the importance of the public interest as embodied in this domain of information for the people.

The CTEA cannot promote the creation of works that already exist. But it will severely diminish the ability of modern creators to generate new art and new knowledge based on existing works — as did previous generations of authors and scholars. Artists, musicians, theatrical performers, scholars, educators, librarians, authors, publishers, archivists, and historians, among others, utilize the public domain. The CTEA harms these users by limiting their access to works through prohibitively expensive licensing fees and conditional permissions for use. The CTEA also prevents the timely preservation of works, deprives scholars of research materials, and reduces funds from educational institutions, thus hampering the preservation and dissemination of information, stories, and documentation of who we are as a people.

4. U.S. Const. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for *limited Times* [emphasis added] to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). *Id.*

ARGUMENT

I. The Court Of Appeals Ignored The Original Intent Of The Framers That The Limited Monopoly Provided By Copyright Should Be Consistent With The Preservation Of A Vibrant Public Domain

The architecture of U.S. Copyright law embodies the principle that works should be available to the public after a limited time, through the avenue of the public domain. The public domain is the priceless repository of works that are ineligible for copyright, were created before copyright law existed, have had their copyrights expire, or have been freely given to the public by their authors. The Framers of the Constitution believed that dissemination of information throughout society was a cornerstone of learning, and thus of the democratic participation of citizens in the cultural and political life of the nation. They were skeptical of all restraints on the free exchange of ideas, whether by public tyranny or private monopoly.[5] Copyright operates as a monopoly for a limited time granted to the creator by the government for exclusive control over a work. This skepticism of the Framers shaped the constitutional "bargain" they struck between creators and the public: the grant of a *limited* monopoly in exchange for the subsequent deposit of works into the public domain.

The DC Circuit, in upholding the constitutionality of the Copyright Term Extension Act,[6] abandoned this constitutional

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5. [E]xclusion [of publishers] from the copyright clause is probably explained by concern for the perceived potential of a booksellers' monopoly in this country, the danger of which the copyright litigation in eighteenth-century England had made manifest . . . Given the vagaries of the political process – and the historically proven skills of publishers as legislative lobbyist – the limitations were essential if the goals of copyright were to be achieved and retained without being consumed by the monopolistic practices in the book trade.

L. Ray Patterson & Stanley W. Lindberg, *Nature of Copyright* 59 (1991).

6. Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827.

bargain by ruling, in effect, that Congress has the power to use repeated extensions of the length of copyright protection for existing works (as well as new ones), transforming a limited monopoly into a virtually limitless one.[7] However, such ever-increasing periods of protection ignore the Constitution's clear directive to "Promote the progress of Science and useful Arts,"[8] and constitute a dangerous expansion of the monopoly created by copyright.

The dangers inherent in this expansion include rendering some older works inaccessible, some prohibitively expensive, and some available only upon restrictive conditions. Moreover, long terms of copyright mean that it is difficult or impossible even to determine who owns the rights that control the use of many cultural resources. This state of affairs differs dramatically from what the Framers envisioned.

Motivated by the need to promote the arts and sciences in a new society where individual freedoms to pursue and share knowledge through speech, religion, and the press were fundamental, the First Congress of the United States passed the Copyright Act of 1790, with the public domain as a central feature of its architecture.[9] This Court has in the past given deference to the acts of the First Congress when seeking enlightenment regarding Constitutional intent because many members of the First Congress were also Framers of the Constitution.[10]

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7. *See supra* note 3.

8. *See supra* note 4.

9. *See* Act of May 31, 1790, ch. 15, 1 stat. 124 (repealed 1831).

10. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in the framing of that instrument . . . is contemporaneous and weighty evidence of its true meaning.' " (quoting Wisconsin v. Pelican Ins. Co., 127 U.S., 265, 297 (1888)). *See also Biographical Directory of the United States Congress, 1774 to Present, available at* http://bioguide.congress.gov/biosearch/biosearch.asp (last visited Nov. 16, 2001) (noting that of the 55 original Founding Fathers, 20 were delegates at the First Congress: 10 Representatives and 10 Senators).

Cognizant of British law, the First Congress modeled the first statutory grant of copyright protection on the 1710 Statute of Anne[11] which itself reflected a deep anti-monopolistic bias.[12] Thus Congress granted fourteen years of protection with a provision for a fourteen-year renewal grant only if the author were alive.[13] Prior to the finalization of the Bill of Rights, Thomas Jefferson had proposed that it include the following language: "Monopolies may be allowed to persons for their own productions in literature, and their own inventions in the arts, for a term not exceeding ___ [sic] years, but for no longer term, and for no other purpose."[14] Although he did not specify a term, Jefferson knew that protection from unduly long copyright monopolies was a fundamental right of the people.[15] This idea was ultimately embodied in the "limited times" language of the intellectual property clause of the Constitution; like other Constitutional clauses, this one contained a grant of power to Congress with built-in restraints.[16] As Professor William Winslow Crosskey noted,

> Reading the [copyright] power, then, in the light of the Statute of Anne and then recent decisions of the English courts, it is clear that this power of Congress was enumerated in the Constitution, *for the purpose*

11. *See* An Act for the Encouragement of Learning, 1710 8 Anne ch. 19 (Eng.) [hereinafter Statute of Anne].

12. *See* Merges, Robert et al., *Intellectual Property In the New Technological Age* 346-47 (2d ed. 2000). Parliament turned its back on publishers' unrestrained monopolies by enacting the Statute of Anne. It vested the new monopoly in authors rather than publishers, and limited it to fourteen years, with a possible renewal for another fourteen. The process of obtaining rights was made complex and very strict. Another anti-monopolistic measure in the statute provided for government power to set maximum prices for copyrighted books upon application by "dissatisfied" consumers. *Id.*

13. *See* Statute of Anne, supra note 11.

14. Thomas Jefferson to James Madison, August 28, 1789, *The Papers of Thomas Jefferson*, Julian P. Boyd, ed., volume 15 (Princeton, New Jersey: Princeton University Press, 1958), p.368.

15. *Id.*

16. *See id.* at note 4.

> of expressing its limitations. And those limitations were expressed, first, because the Convention did *not* desire that Congress should have any power to grant perpetual copyrights; and, second, because it *did* desire, by restricting Congress to the creation of limited rights, to extinguish, *by plain implication of "the supreme Law of the Land,"* the perpetual rights which authors had, or were supposed by some to have, under the Common Law.[17]

This history provides additional evidence of the Framers' view of intellectual property as a creature of positive law, designed for the public benefit.[18] Likewise, the constitutional language relating to copyright protection suggests three primary goals: promotion of learning, protection of the author, and preservation of the public domain.[19] Consistent with the Framers' views, the original copyright legislation and subsequent congressional acts until the 1909 Copyright Act[20] encouraged an expansive vision of the public domain.[21]

Modern scholarship stresses the centrality of the public domain to the public purpose of copyright law.[22] Professor Jessica Litman has stated

> American ideas of freedom are bound up with a vision of information policy that counts information as social wealth owned by all. We believe we are

17. William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 486 (1953).

18. Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, U. Ill. L. Rev. 1119, 1154 (2000).

19. *See supra* note 5 at 49.

20. Pre-1909 term extensions were few and modest. *See* Timothy R. Phillips, *The Unconstitutionality of the Copyright Term Extension Act of 1998*, 72 n.27.

21. Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 Cardozo, Arts & Ent. L.J. 491, 513 (1999).

22. *See id.*

> entitled to say what we think, to think what we want, and to learn whatever we're willing to explore. Part of the information ethos in the United States is that facts and ideas cannot be owned, suppressed, censored or regulated, they are meant to be found, studied, passed along and freely traded in the "marketplace of ideas."[23]

Further, Professor Yochai Benkler sees the public domain as a vehicle for "a robust democratic discourse, of diversity of antagonistic voices, and of individual expressive autonomy."[24]

Nevertheless, congressional copyright extensions have dramatically suppressed the growth rate of the public domain.[25] The CTEA, Congress' most aggressive extension to date,[26] imposes extraordinary new restrictions on public access to copyrightable works by adding twenty years to all but a portion of one of the categories protected in the Copyright Act.[27] The DC Circuit appropriately recognized congressional authority to enact legislation that promotes creative labor through copyrights. However, the DC Circuit failed to recognize that lengthy copyright terms as embodied in the CTEA, violate the Constitutional mandate "to promote the Progress of Science and useful Arts."

Unless the court's decision is reversed, the public will be deprived of new cultural resources that depend on the availability of prior work on reasonable terms.

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23. Jessica Litman, *Digital Copyright* 1 (2001).

24. Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, (Nov. 2001) (unpublished Framing Paper, *available at* http://www.law.duke.edu/pd/papers.html) (last visited Nov. 29, 2001).

25. *See supra* note 20. *See also* http://www.law.asu.esu/homePages/Karjalaopposingcopyrightexpansion/constitutionality/phillips02.html (last visited Oct. 3, 2001).

26. *See supra* note 20.

27. *See* Copyright Act, 17 U.S.C. § 303(a) (2000). The one exception is for the attributed works created but not copyrighted before 1978.

II. The DC Circuit's Decision Harms The Public Interest In Copyright Law By Minimizing The Public Domain

The DC Circuit ignored the long line of Supreme Court cases that affirm the primacy of the public interest in copyright law.[28] In particular, it overlooked the oft-stated view of this Court as set forth in *Twentieth Century Music Corporation v. Aiken*:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright term required by the Constitution, reflects a balance of competing claims upon the public interest: creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.[29]

The public domain is an essential component of a copyright system that fulfills the public interest. In particular, it helps to secure the "broad public availability" of information to which this Court referred in *Aiken*. Restrictions on the growth of the public domain directly and adversely affect that public interest in a variety of ways.

Although the number of creators and creations has grown over time, every term extension has created a period of "zero

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28. *See Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expressions for the good of the public"); *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors but to 'promote the Progress of Science and useful Arts' "); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration"); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors").

29. *Twentieth Century Music Group v. Aiken*, 422 U.S. 151, 156 (1975).

growth" in the public domain as shown in chart i.[30] The resulting decline in the rate at which this resource accumulates is unwarranted in a nation that cherishes the promotion of creative and scientific works for the betterment of its people.

The public domain benefits the public by providing inexpensive and ready access to many works of literary, scientific, historic, social and artistic importance, and by supporting innovation and the expansion of knowledge. Works within the public domain are the foundation for new creativity: creators rarely produce original works isolated from cultural tradition, but in every era authors have drawn extensively on public domain materials.[31] While all works are not pastiche, even the most innovative incorporate previous ideas and expressions.[32] For example, modern dance pioneer Martha Graham frequently expressed her indebtedness to public domain materials that encouraged her creative process and fostered acclaimed new works.[33]

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30. *See* appendix I.

31. For as Justice Story explained,

> [i]n truth, in literature, in science and in art, there are, and can be, few if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

Campbell v. Acuff-Rose, 510 U.S. 569, 575 (1994) (quoting Emerson v. Davies, 8. F. Cas. 615, 619 (1845)).

32. Elton Fukumoto, *The Author Effect After the "Death of the Author" Copyright in a Post-Modern Age*, 72 Wash. L. Rev. 903, 933 (1997) ("Historically a recognition existed that imitation, borrowing, and copying was an inevitable part of creating works of art, but only in the post Romantic period did such artistic appropriation constitute copyright infringement . . ."). *Id.*

33. Siva Vaidhyanathan, *Copyrights and Copywrongs* 186 (2001) (describing how Graham was inspired by the Declaration of Independence, Greek mythology, African culture, and Native American legends).

Similarly, the Walt Disney Company has used many stories and previous works from the public domain in creating its internationally recognized animated movies. The old tales of *Snow White and the Seven Dwarves*, *Cinderella*, and *Sleeping Beauty*, as well as modern works of authorship such as *Pinocchio*, the *Jungle Book*, and the *Hunchback of Notre Dame*, were public domain works utilized by Disney to produce some of American cinema's most memorable icons.[34]

Public domain status also gives the public new opportunities to appreciate older works. In 1993 Willa Cather's *My Antonia* entered the public domain and in 1994 seven new editions appeared (costing from $2 to $24) making the story available to many more people than had previously read it.[35] Likewise, the children's book *The Velveteen Rabbit* became a widely popular classic once it passed into the public domain. Although the original version is still in print, newly illustrated versions that

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34. *See* Heidi Anne Heiner, *Sur La Lune Annotated Fairy Tales* (Oct. 14, 2000) *at* http://members.aol.com/rocketrder/frytales/snowhite/history.htm (last visited Nov. 18, 2001) (relating that *Snow White* was originally recorded by the Grimm brothers in 1818); *see* Tiffany Jensen, *Cinderella The Evolution of a Story: An Examination of the Cultural Significance of Oral History*, *available at* http://www.usu.edu /anthro/origins_of_writing/cinderella (last visited Nov. 18, 2001) (noting that *Cinderella* and *Sleeping Beauty* are both direct representatives of "Histoires ou Contes Du Temps Passe" [Tales of Times Past] by Charles Perrault, 1697); *see* Bob's World Literature Page *at* http://www.intac.com/~rfrone/Lit/1106/1106-00.htm (last visited Nov 18, 2001) (explaining that *Pinocchio* was originally created in 1883 by Carlo Collodi, and released as a movie in 1940 by Disney). *Jungle Book* was written in 1894 by Rudyard Kipling (who died in 1936) but which, had CTEA's rules applied, would not have been available for use by Disney until 2007, 40 years after Disney released its version as a movie, *at* http://www.ricochet-jeunes.org/eng/biblio/author/kipling.html (last visited Nov. 18, 2001); and the *Hunchback of Notre Dame* appeared in 1831, *at* http://www.kirjasto.sci.fi/vhugo.htm, (last visited Nov. 18, 2001).

35. *See* S. Rep. No. 104-315 at 37 (1996) (Statement of Sen. Herb Kohl).

creatively interpret the story have been released, and seven different editions are now listed in *Books in Print*.[36]

Generally, the CTEA extends the term (and therefore the economic reward) of copyright protection, creating disturbing consequences. Users must incur further costs for licensing fees (which effectively limit the amount of material available for public use), while many creators and scholars face costly impediments to identifying and locating rights holders for older, lesser-known works, which may entail multiple ownership tiers. Even the necessity of *seeking* permission to use such works may be prohibitive because of the high search and negotiation costs involved. The CTEA, under certain circumstances, may subject the public and institutions that disseminate information to additional expense and burdens with very uncertain benefits.[37] As a consequence, institutions large and small may forgo use of those works. For example, the University of Texas, apparently conscious of potential liability, prohibits students, faculty or staff from using copyrighted works if permission cannot be obtained, even if a good faith effort is made to secure such permission, and even if a persuasive fair use argument may be made.[38]

Specifically, the CTEA imposes a twenty-year moratorium on works entering the public domain.[39] Were it not for the CTEA,

36. *See* Horn Book Inc. *at* http://www.hbook.com/exhibit/editorial_eh.html (last visited Dec. 4, 2001).

37. *Amici* are well aware that the CTEA provides an exemption in § 108(h) of Title 17 U.S.C. (Copyright Act) for librarians and archivists to have access to a limited group of works within the last twenty years of a work's copyright protection term. However, use of the exemption requires compliance with various conditions.

38. University of Texas policy, *available at* http://www3.utsystem.edu/ogc/IntellectualProperty/cprtpol.htm (last visited Dec. 4, 2001).

39. *See supra* note 6. The only exception to this proposition is represented by unpublished works whose authors died prior to 1933; if not published by the end of 2002, these works will become generally available to the public. Copyright Act, 17 U.S.C. § 303(a) 2000.

the decades from 1998 to 2018 would have seen the entry into the public domain of a wide variety of works published in the United States between 1923 and 1943, in addition to many unpublished works by authors who died prior to 1968.[40] The following examples illustrate the harms flowing from the general phenomenon of the erosion of the public domain by copyright extension.

1. Copyright Term Extension Harms Disseminators Of Information

Primary disseminators of information include educators, archivists and librarians. These individuals and their organizations serve the public without commercial gain, seeking only to benefit users through promoting accessible information, exposure to arts and sciences, and cultural enrichment, drawing in part on the public domain.

a. Educators and librarians:

Educators face many difficulties obtaining works by important authors at reasonable prices. The CTEA affects educational enterprises by adding to the cost of books that are commonly assigned for class use, such as *The Great Gatsby* and *A Farewell to Arms*.[41]

Copyright term extension also inhibits educators' efforts to provide students with texts in electronic form. Electronic teaching tools have become an important resource for educators, as evidenced by the success of The Dickens Web, a successful

40. *Id.* at § 303 and 304(a). 304(a)-terms based on publication and 303-unpublished works, providing an alternative basis for calculating term (life of author or until the end of 2002, whichever is longer).

41. *See* S. Rep. No. 104-315 at 34 (1996) (Statement of Sen. Hank Brown). In 1996 Bantam Books conducted a study and determined that almost 12 million literary classics are sold each year to high schools and colleges. One analysis concluded that if copyright were extended twenty years, consumers including schools and students would pay out an additional $345 million in royalties. *Id.* at 34. *See also* S. Rep. No. 104–315 at 37 (1996) (Statement of Sen. Herb Kohl). Moreover, firms like Scribners, publisher of Fitzgerald and Hemingway, long charged their educational customers high prices for reprints of modern classics. *Id.* at 37.

hypertextual research and educational site detailing the world of Charles Dickens.[42] The creation of such pedagogical tools becomes difficult or impossible if the information needed remains under copyright protection. Thus, copyright concerns will continue to inhibit the development of similar resources for the study of twentieth-century culture.

2. Copyright Term Extension Harms Creative Users Of The Public Domain

Copyright term extension adversely affects not just institutional disseminators, but also a wide variety of creative users of public domain material. These include theatrical and musical performers, authors, publishers, and film scholars.

a. Theatrical and musical performers:

Without the public domain, every theater in the nation, be it a high school or the Kennedy Center, would first need to obtain permission from Shakespeare's heirs to perform any work by Shakespeare. In the future, under the current regime of repeated copyright term extension, this requirement of securing permission may be the case for the plays of Tennessee Williams and other twentieth-century playwrights for many decades to come. Term extension poses additional dilemmas for would-be performers of dramatic works. For example, a recently published play, *Painting Churches*, includes the following direction to potential licensees: "Note: Permission to produce *Painting Churches* does not include permission to use this song ['Nothing Could Be Finer'], which ought to be procured from the copyright owner;" and on another page, "Note: This song is still under copyright protection. Permission to use it in productions of *Painting Churches* ought to be procured from the copyright owner."[43] The potential producer must identify, locate, and

42. *See* http://www.eastgate.com/catalog/Dickens.html (last visited Nov. 27, 2001) (offering educational software package that provides electronically linked text and images that interact and provide different pathways of information for the user to follow).

43. Tina Howe, *Painting Churches*, 11,35 (Samuel French, Inc. 1982) 1984.

receive permission from unnamed copyright owners, a costly and burdensome exercise.

Today, many regional theaters forgo performing classic American musicals because producers cannot afford the necessary licensing fees.[44] Even if they can, the copyright holder may restrict the interpretation of the work to reflect contemporary times and issues. For example, theaters are barred by the Gershwin Family Trust from producing *Porgy and Bess* (1934) with casts including white performers.[45] Permission to perform Rodgers and Hammerstein works is also subject to strict conditions.[46] Copyright extension reduces opportunities for new artists to expand on or reinterpret materials that would otherwise have been part of the public domain.

Merely singing songs in the most innocent of situations is touched by copyright extension. For example, restaurants where waiters serenade customers with "Happy Birthday" (in which the copyright now will not expire until at least 2030)[47] might be forced to pay performance rights fees to copyright holders.[48]

b. Authors and publishers:

Term extension yields other examples of results completely disconnected from the incentive rationale for copyright protection. In one instance, a university press required the author of a book on city planning to pursue permissions for use of a

44. *See supra* note 44 at 37.

45. Gail Russell Chaddock, *Public Interest v. Private Rights*, Chicago Sun-Times, June 21, 1998, at 31.

46. Rodgers and Hammerstein Theatre Library, Below are Some Questions Commonly Asked By Theatre Library Customers . . . , *at* http://www.rnh.com/theatre/tlnews/qanda_test.html (last visited Nov. 18, 2001).

47. *"Happy Birthday" Song Sold to Warner Communications*, *Time*, Jan. 2, 1989, at 88 (describing how Warner Communications bought the copyright to "Happy Birthday to You" for an estimated price of $25 million, stating that "Warner is equipped with computer capacity and other resources to track uses;" at the time Warner purchased the song, the expected copyright expiration was 2010).

48. *See supra* note 45.

previously unpublished photograph of Charles Mulford Robinson, who died in 1917. The photographer's name was unknown, and securing permission was impossible.[49] In another instance, a television network required permission to use a similarly unpublished 1912 photograph of Jim Thorpe running on the deck of a ship en route to the Stockholm Olympics. The photograph, containing no indication of the photographer, established no clear evidence of ownership, and thus a clear path for securing permission could not be established.[50] Even when creators can surmount the costs of permissions and invest the complicated and time-consuming effort, this requirement creates enormous burdens for scholarship, documentary filmmakers and authors.

In the domain of fiction, as well, excessive copyright can restrict, rather than promote, creative production. A notorious recent example of attempted private censorship utilizing copyright law is the case of Alice Randall's *The Wind Done Gone*. This work, offering a revisionist portrait of the antebellum South, is a creative and critical commentary on Margaret Mitchell's *Gone With the Wind* in the form of the first-person narrative of Scarlett O'Hara's black half-sister.[51] Only because of copyright term extension could the Mitchell estate sue to suppress Randall's work. At the time of its first publication, *Gone With the Wind* was due to enter the public domain no later than 1992. However, because of successive term extensions, this work will not be freely available for public use until 2031 (presuming no further extensions by Congress).[52]

49. Personal communication with William J. Maher, University Archivist, Univ. Ill. at Urbana Champaign, Oct. 31, 2001.

50. *Id.*

51. *See Suntrust Bank v. Houghton Mifflin Co.*, No. 01-12200, 11th Cir. LEXIS at 1; 60 U.S.P.Q. 2d (BNA) 1225 (2001). Randall, an African-American woman, was disturbed by the characterization of blacks in the novel.

52. *See* Lawrence Lessig, *Let the Stories Go*, April 30, 2001, N.Y. Times op-ed. http://www.nytimes.com/2001/04/30/opinion/30LESS.html (last visited Oct. 25, 2001).

3. Copyright Term Extension Harms Scholarly Institutions And Scholars Who Utilize The Public Domain

a. Archivists and historians:

Those who preserve and interpret history face similar problems. For example, important documents relating to World Wars I and II remain and will continue to remain inaccessible. Dwight D. Eisenhower died in 1969, so the copyright in his non-presidential papers will not expire until the end of 2039, restricting use of his letters ruminating on the conduct of World War II until nearly a century after that war was fought. Meanwhile, Eisenhower's thoughts on his service in World War I cannot be fully utilized in historical scholarship without costs and/or restrictions until more than 121 years after the 1918 Armistice.[53]

Copyright term extensions can severely limit the publication of scholarly works, as a recent article on the Civil War submitted to a historical journal demonstrates.[54] The author used compelling excerpts from soldiers' diaries and letters to compare the perceptions and sentiments of western soldiers with those of their eastern counterparts. The journal would not accept the article unless the researcher obtained signed permissions from the families (and other copyright holders if applicable) of every soldier who was quoted, since the materials could conceivably still enjoy copyright protection. The last Civil War veteran died in 1959; thus, under the CTEA, the copyright on some previously unpublished letters could endure until 2030.[55] Because archives

53. *See* DWIGHT D. EISENHOWER: Papers, Pre-Presidential, 1916-52 Finding Aid, *available at* http://www.eisenhower.utexas.edu/listofholdingshtml/listofholdingsE/EDDPREPRESIDENTIAL/1652.pdf, (last visited Dec. 6, 2001). The guide notes that "Literary rights in the writings of Dwight D. Eisenhower are held by his literary executor, John S.D. Eisenhower." *Id.*

54. E-mail from Peter Hirtle, Co-Director Cornell Institute for Digital Collections, to Peter Jaszi, Counsel of Record (Nov. 29, 2001).

55. Civil War correspondence published in even a limited edition before 2003 would enjoy protection until 2047, a term extended by the CTEA. *Id.*

include items of mixed and unknown provenance, the task of clearing such copyrights may involve genealogical and probate inquiries dwarfing the scope of the original research effort.[56] The journal's reluctance to gamble on a potential copyright infringement action prevented the publication of this important article.[57]

Similarly, archivists desiring to make digital copies of Civil War materials available to schools and universities to further public understanding are thwarted in their efforts by excessive copyright terms.[58] As Roy Rosenzweig noted in a recent article in the Journal of American History, "[f]or historians, copyright protection has redlined . . . much twentieth-century history . . ."[59]

56. In some cases the soldier's family may have donated or sold the letters and diaries to a repository, while other documents and letters may have been originally found in old houses, furniture, or suitcases by people with no direct connection to the writers. Ownership of a physical letter does not necessarily carry with it the right to use the contents, 17 U.S.C. § 303.

57. Had this incident occurred in Canada, the author would only have had to make a documented good faith effort to locate the copyright owners and submit the documentation of the unsuccessful search to the Copyright Board. In cases where a copyright holder cannot be located, the Board is authorized by Canada's Copyright Act to grant a license. License fees are held in trust for missing rights holders who may claim royalties up to 5 years after the expiration of a Board-issued license as codified in § 77 of the Canadian Copyright Act, R.S.C., C-30, S.1., *available at* http://www.cancopy.com (last visited Nov. 20, 2001). U.S. law contains no such provision. *Id. See also* http://www.cb-cda.gc.ca/info/act-e.html#rid-33225 (last visited Dec. 6, 2001).

58. Peter B. Hirtle, *Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Use*. Interdisciplinary Conference On The Impact Of Technological Change On The Creation, Dissemination, And Protections Of Intellectual Property, The Ohio State University College of Law, Columbus, OH. March 8-10, 2001. Forthcoming in the *Journal of the Copyright Society*. Preliminary draft version for conference attendees *available at* http://cidc.library.cornell.edu/copyright/Hirtle_OSU_paper.pdf, (last visited Nov. 22, 2001).

59. Roy Rosenzweig, *The Road to Xanadu: Public and Private Pathways on the History Web*, 88 J. Am. Hist. 2, (2001).

If copyright term extension survives constitutional challenge, opportunities for new artists to expand on the culture of the past will be fewer, and citizens will miss opportunities to be exposed to, and enriched by, primary historical documents and knowledge.

b. Film scholars and archivists:

A film scholar and author of the book *Film, Form, & Culture*, a textbook with an accompanying CD-ROM, chronicles the difficulty and cost of identifying and obtaining permission for use of films from the twentieth century. The Second Edition increased in cost when the author included clips from two "B" gangster films of the late 1940's and 50's, for which the copyright owner demanded $2,000 for 120 seconds of clips. This same author also could not use any clips by Disney-owned works, which are not licensed for CD-ROM use as a general policy.[60] Although a modified version of *Film, Form, and Culture* was eventually published, the need to obtain permission may chill similar publications for decades to come, since under the CTEA many pre-1960 American films will be protected well into the twenty-first century.

Although the CTEA is sometimes characterized as promoting the preservation of America's film heritage, the reality is otherwise.[61] Thousands of old movies sit on shelves deteriorating because the companies that hold the copyrights make no efforts to restore them or make them available, while their copyright status prevents others from preserving such works.[62] By the time many of these works are finally available to enter the public domain, prints and negatives will have physically disintegrated. These endangered works include not

60. Telephone interview with Robert Kolker, Chair, School of Literature, Communication, and Culture, Ivan Allen College, Georgia Institute of Technology (October 16, 2001).

61. *See supra* note 41 at 30.

62. Jesse Walker, *Copy Catfight*, Reason On Line (March 2000) *available at* http://www.reason. com/0003/fe.jw.copy.html, (last visited Dec. 5, 2001).

only film "classics," but also industrial films, forgotten examples of silent cinema, footage from uncompleted projects (such as Orson Welles' *Don Quixote*), and kinescopes of programs from the "golden age" of television.[63]

CONCLUSION

Unless the decision of the DC Circuit is reversed, the CTEA and subsequent extensions of copyright terms will continue to impede the growth of the public domain. *Amici* do not argue against licensing fees as an appropriate means of rewarding authors and creators, nor do we suggest that we are prevented from invoking the fair use doctrine in appropriate situations. However, the practical result of copyright term extension, by maintaining unnecessary barriers to the accessibility of information, diminishes the ability of the public to be educated, to be entertained, and to engage in debate. Through excessive copyright extension, copyright owners will continue to restrict access to and exert censorial control over millions of works, thereby chilling discourse and cultural development long after incentives for production have ceased to operate.[64] The Framers of our Constitution envisioned a very different role for copyrights.

Every member of society, from the toddler who hears a fable for the first time to the archivist who meticulously inventories the wealth of information present on the World Wide Web, has the constitutional right to use and receive information. *Amici* urge this Court to recognize the breadth of the harms the public will suffer if the CTEA is not found unconstitutional and to reaffirm the Framer's intent for Congress to promote the public's interest through balanced copyright law.

For the foregoing reasons, this Court should grant the writ of certiorari and the judgment of the DC Circuit should be vacated and reversed.

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63. *Id.*

64. Neil Weinstock Netanel, *Copyright and a Democratic Society*, 106 Yale. L.J. 283, 285 (1996).

Respectfully submitted,

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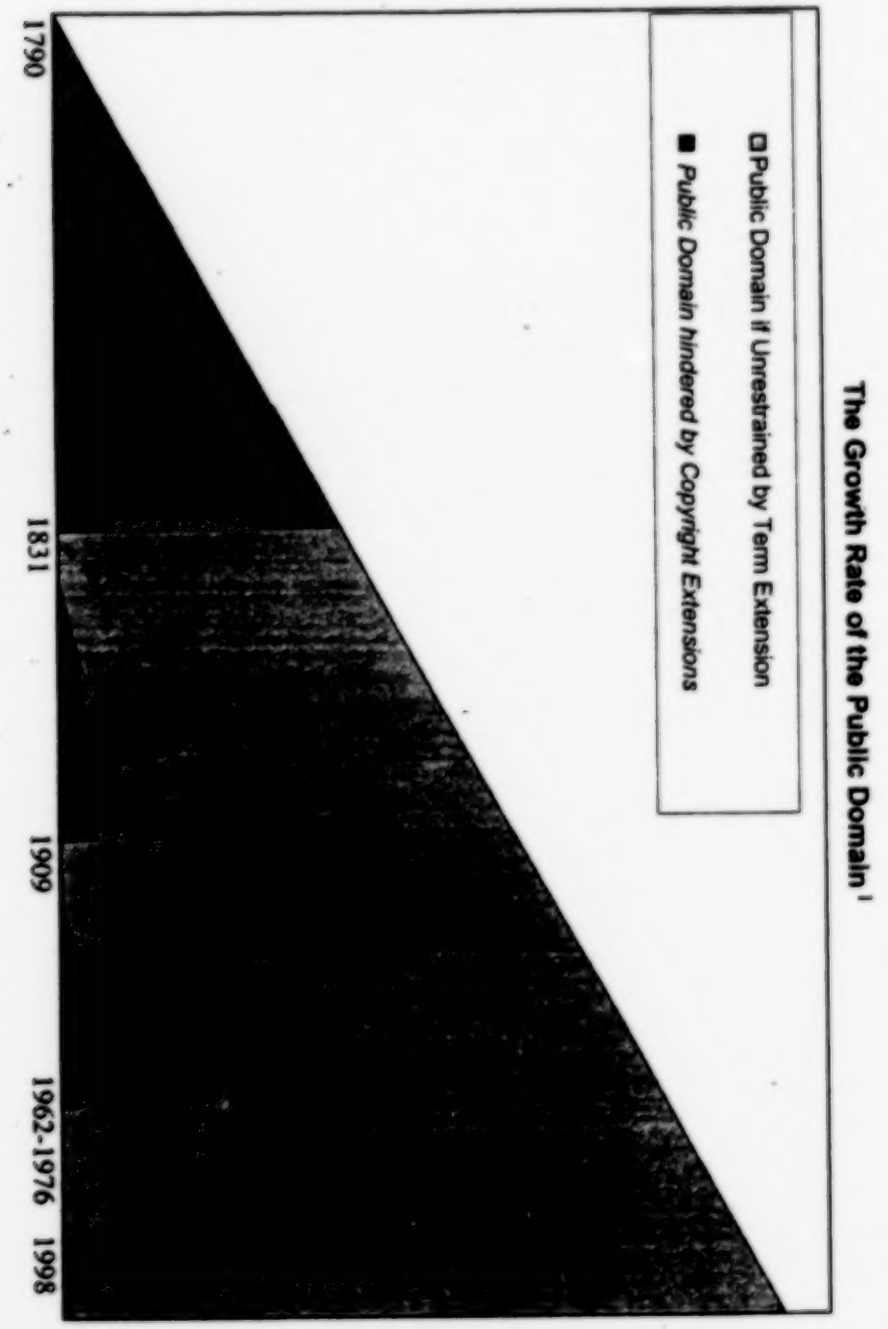
APPENDIX

APPENDIX I — THE GROWTH RATE OF THE PUBLIC DOMAIN



1. This chart is a visual representation of *amici's* understanding of the decline of the growth of public domain as a result of repeated copyright term extensions.

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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, ET AL.,

Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF JACK M. BALKIN, YOCHAI BENKLER, BURT NEUBORNE, AND JED RUBENFELD AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, the undersigned law professors submit this brief as *amici curiae*, pursuant to Rule 37 of the Rules of this Court.

Amici are teachers and students of constitutional law and the First Amendment, who have studied its application to copyright. They are Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School; Yochai Benkler, Professor of Law, New York University School of Law; Burt Neuborne, John Norton Pomeroy Professor of Law, New York University School of Law; and Jed Rubenfeld, Robert R. Slaughter Professor of Law, Yale Law School. They submit this brief *pro* se, representing no institution, group, or association. Their sole purpose is to offer what assistance they can to this Court as it considers whether to grant the petition for certiorari in this important case about the relationship between the First Amendment and copyright. In particular, this brief is filed to present to the Court an argument about the appropriate general framework for First Amendment review of substantial legislative changes in copyright law.

SUMMARY OF ARGUMENT

The Court of Appeals for the District of Columbia has taken the extraordinary step of categorically immunizing copyright legislation from first amendment review. "Copyrights," the court held, "are categorically immune from challenges under the First Amendment." *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001). "[W]e reject [plaintiffs'] first amendment objection to the CTEA ***because the plaintiffs lack any cognizable first amendment***

right to exploit the copyrighted works of others." *Id.* at 376. (emphasis added)

If the appellate court's holding means what it says—that individuals have no "cognizable First Amendment interest in exploiting the works of others," *Id.*—then the fair use doctrine exists at congressional sufferance, a flat contradiction of this Court's ruling in *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985). In *Harper & Row*, the Court expressly referred to fair use as one of the "First Amendment protections . . . embodied in the Copyright Act[.]" *Id.* at 560. Fair use could not be a "First Amendment protection" if individuals had no "cognizable First Amendment interest in exploiting the works of others."

The disposition below is consistent with such a categorical immunity. The Court of Appeals upheld the term extension law without any consideration of its tailoring to its purpose, or, indeed, its bare rationality. It did not consider even the retroactive application of the challenged statute—a provision unlikely to survive even a minimal requirement that it be rationally related, much less narrowly tailored, to the constitutional mandate of copyright legislation, to "supply the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558.

But even if the Court of Appeals' decision can be interpreted more narrowly, to mean only that under *Harper & Row* the idea/expression dichotomy and fair use *exhaust* the limitations on copyright required by the First Amendment, that position is insupportable and conflicts with a recent decision by the Court of Appeals for the Second Circuit. In *Universal City Studios, Inc. v. Corely*, 2001 U.S. App. LEXIS 25330 (2d Cir. Nov. 28, 2001) the

court upheld Section 1201(a)(2) of the Copyright Act only after clearly and explicitly subjecting that provision to heightened first amendment scrutiny, *id.* at *62-63, following the standard set by this Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*").

The correct interpretation of *Harper & Row*—recently expressed by the Court of Appeals for the Eleventh Circuit in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001)— is that doctrines internal to copyright law usually prevent copyright from conflicting with the First Amendment. Any law—copyright included—that is implemented by telling anyone that there are some words or images that they may not print, publish, or display publicly raises a first amendment question. When that law is copyright law, the prohibition is normally permitted, and conflict with the First Amendment is generally avoided by safety valves internal to copyright law—like the idea/expression dichotomy, the fair use doctrine, or copyright law's placement of some materials in the public domain. In *Harper & Row* this Court held that these safety valves obviated the need for a *special* first amendment-based public figure exception to copyright. But if Congress passes a statute that undermines those safety valves—say, by eliminating fair use altogether or by passing a hypothetical law excluding fair use of works authored by Republican Senators—of course that statute would be subject to First Amendment review, and would almost certainly fail.

Copyright law is not a law aimed at conduct that incidentally affects speech. It is a law aimed at improving the marketplace in expression, which is implemented by suppressing some expression—perhaps derivative, perhaps imitative—so as to support other expression—original and

creative. But it is nonetheless a law that directly prohibits protected speech. Broadcasting portions of Dr. Martin Luther King's "I Have A Dream" speech in a documentary, *see* Estate of Martin Luther King Jr., Inc. v. CBS, Inc., 194 F.3d 1211 (1999), is no less valuable to the marketplace of ideas, or to the expressive freedom of the film maker, than is a mediocre—though original and non-infringing—song about puppy love. Yet copyright is often implemented precisely by prohibiting such public expression. As a law directly aimed at speech and operating by imposing selective prohibitions on communication, copyright law must be subject to heightened scrutiny.

The Court need not, however, consider whether the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. § 304), is indeed invalid under the First Amendment. All the Court need do is remand with instruction for the court below to review the CTEA under the standard appropriate for laws specifically aimed at regulating expression in pursuit of legitimate state interests, which requires some degree of heightened scrutiny.

ARGUMENT

I. The Decision Below Misconstrues *Harper & Row* To Create A New And Unusually Expansive Immunity From Judicial Review For Copyright Legislation

The opinion of the court below is the most explicit of a number of circuit court decisions that have taken the unusual step of substantially immunizing an entire area of

congressional legislation from first amendment review.[1] "Copyrights," the court held, "are categorically immune from challenges under the First Amendment." *Eldred*, 239 F.3d at 375. The categorical nature of this exclusion is clearest in that court's conclusion of its analysis of the petitioners' first amendment challenge: "we reject their first amendment objection to the CTEA *because the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others*." *Id.* at 376. (emphasis added)

This formulation places expression that uses copyrighted cultural materials in a shrinking group of categorically disfavored speech—like obscenity and fighting words. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Defamation was once such a category,

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[1] Other circuits have advocated a more limited version of this position, namely, that elements of the Copyright Act–fair use and/or the idea/expression dichotomy–exhaust First Amendment considerations in the field of copyright. The Ninth Circuit is one example. *See, e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) ("We note that First Amendment concerns in copyright are allayed by the presence of the fair use doctrine."); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (stating that "the idea-expression dichotomy . . .serves to accommodate the competing interests of copyright and the First Amendment"). Earlier decisions of the Second Circuit could be read to adopt a similar stance. *See, e.g., Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) (stating that the Second Circuit has "repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine"); *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) ("Our observation that the fair use doctrine encompasses claims of First Amendment in the copyright field, never has been repudiated.") (citations omitted); *Roy Export Co. v. CBS, Inc.*, 672 F.2d 1095, 1099 (2d Cir. 1982) ("No circuit that has considered the question...has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the "fair use" doctrine.").

see Beauharnais v. Illinois, 343 U.S. 250 (1952), but that categorical exclusion has been substantially limited since the 1960s. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *R.A.V* 505 U.S. at 382. Commercial speech was once such a category, *see Valentine v. Chrestensen*, 316 U.S. 52 (1942), but that categorical exclusion has largely been abandoned since the 1970s. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

Even within this shrinking group of categorical exclusions from the ambit of first amendment protection, statutes are not exempt from review simply through the act of categorizing them. Obscenity, though constitutionally unprotected, does not accord legislation purporting to regulate it such categorical immunity, for even with obscenity laws courts must assure that the law actually covers only obscene materials. *See Miller v. California*, 415 U.S. 15, 23-24 (1973) ("We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we . . . confine the permissible scope of such regulation to works which depict or describe sexual conduct."). Fighting words do not accord such status to laws purporting to regulate them, for the court must still see if the regulation of fighting words in fact regulates that which is "fighting" about them or that which is "words." *R.A.V.*, 505 U.S. at 385-6.

On its face, then, the decision below created a unique categorical First Amendment rule: it is sufficient to characterize a restraint as applying to works covered by copyright law to immunize that legislative restraint from

review. "The works to which the CTEA applies, and in which plaintiffs claim a first amendment interest, are by definition under copyright; that puts the works on the latter half of the 'idea/expression dichotomy' and makes them subject to fair use. This obviates further inquiry under the First Amendment." *Eldred*, 239 F.3d at 376.

The Court of Appeals based this unusual exception to First Amendment law on a misreading of this Court's precedent in *Harper & Row*. In particular, it based its exception on an unnecessarily broad and incorrect interpretation of this Court's statement that "Copyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556.

In *Harper & Row*, the Nation Magazine asked the Court to create a special first amendment exception to copyright law for news reporting that used copyrighted materials. This the Court refused, concluding, "we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright." *Harper &* Row, 471 U.S. at 560.[2] There was no need, the Court held, to create such a *special* first amendment exception to the scope of copyright law "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the

[2] Elsewhere the Court characterized the argument it rejected in these terms: "The fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication." 471 U.S. at 557.

latitude for scholarship and comment traditionally afforded by fair use. . . ." *Id.*

The Court's holding was, therefore, exactly the inverse of the interpretation adopted below. Far from users having no "cognizable First Amendment right to exploit the copyrighted works of others," the Court treated specific doctrines of copyright law as "First Amendment protections."[3] No law could be a "First Amendment protection" unless someone who could claim its benefit has a cognizable first amendment interest in doing what the law permits. How could one say that Alice Randall, author of a book entitled *The Wind Done Gone*, has no first amendment interest in using elements of *Gone With the Wind* to tell her critical tale from a slave's perspective. *See Suntrust Bank*. *Gone With the Wind* defined the popular cultural perspective of the Old South in which Randall grew up as an African American woman. One can speak coherently about Randall's first amendment interest being outweighed, insofar as she used another's story elements, by the legislative purposes of copyright law. But it is incoherent to say that she has "no cognizable first amendment interest" in writing and publishing a book in which she uses that story line in a way that she believes will be politically significant and personally liberating. The very essence of the First Amendment is the "freedom to think as you will and to speak as you think," *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Certainly her interest in using the words she

[3] *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994) (evaluating eligibility of a potentially infringing work to be treated as a parody and a fair use by quoting with approval the statement that "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed," quoting *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 280 (SDNY 1992) (Leval, J.)).

believes will best convey her views is no weaker than Paul Cohen's choice of locution to criticize the draft. *Cohen v. California*, 403 U.S. 15 (1971).

The implication of *Harper & Row* is that, far from copyright being immune to First Amendment review, legislation that would seek to change at least some elements of copyright law—those deemed to be first amendment protections—must be reviewed to see if the change excessively undermines those protections. At least those doctrines expressly identified by the Court—fair use and the idea/expression dichotomy—could not be repealed or substantially weakened without being subject to first amendment review.

Perhaps, however, the words used by the court below were mere hyperbole, and an interpretation of its opinion in terms less directly in conflict with this Court's precedents is available. Perhaps the court below merely held that since the CTEA left the fair use doctrine and the idea/expression dichotomy untouched, no First Amendment issue can be raised. Even on this sympathetic reading, at a minimum the Court below held that fair use and the idea/expression dichotomy *exhaust* the first amendment protections embodied in the copyright law. On this reading, the First Amendment has nothing to say regarding any other line along which the boundary between the public domain and the proprietary is drawn. But this is an implausible reading of the First Amendment. The public domain defines the set of expressions individuals can make use of free of the legal proscriptions Congress enacts in aid of the incentives of authors. Any legislation that substantially increases the set of circumstances under which law prohibits expressions previously permitted is legislation that must be carefully scrutinized.

There is no reason to think, then, that this Court's listing in *Harper & Row* of the two first amendment protections relevant to that case—fair use and the idea/expression dichotomy—was intended to exhaust all copyright doctrines that play such a role. As the Court of Appeals for the Eleventh Circuit in *Suntrust Bank* recently put it, "the balance between the First Amendment and copyright is preserved, *in part,* by the idea/expression dichotomy and the doctrine of fair use." 268 F3d at 1263 (emphasis added). Because of these protections, "courts *often* need not entertain related First Amendment arguments in a copyright case." *Id.* at 1265 (emphasis added).

First, the First Amendment clearly protects specific modes of expression, not only ideas. As this Court stated in *Cohen v. California,* "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." 403 U.S. at 26. The idea/expression dichotomy cannot *by itself* play the unilaterally definitive role that the court below attributed to it.

Second, fair use provides important mitigation of the first amendment burdens imposed by the Copyright Act, but it too limits quite substantially the expressive uses that one can make of copyrighted works. It is a doctrine tailored to continue to preserve some freedom of expression for users, but is still bounded by the government's interest in providing owners incentives.

Fair use, then, is very much constrained by the need to secure incentives to authors. But after the role of copyright in providing incentives for creation has largely dissipated with the passage of time, it is not only sound policy that requires removal of all those burdens on speech

that we tolerate to secure these incentives. The First Amendment demands that individuals no longer be prohibited from expressing themselves as they will, including by using materials previously copyrighted, when doing so would no longer serve the government's stated interest. A new annotated edition of *Gone with the Wind* could play an important role in political discourse even if it took too much to enjoy the protection of fair use. Prohibiting its publication when doing so can no longer be said to contribute to the likelihood of the novel's creation cannot be squared with the First Amendment. The same can be said of a new staging of Shakespeare's *Richard III* set as a 20th century critique of fascism, or publishing Victor Hugo's discourse on insurrection from *Les Miserables*. Term limitation is the most extensive and substantive source of public domain materials available for use unburdened by solicitude to congressional copyright policy.

II. Legislation That Substantially Expands Copyright Should Be Subject To Heightened First Amendment Scrutiny

The Copyright Act is a statute that regulates speech. It tells some people that they cannot print or publicly present certain words or images. It is not a law aimed at general conduct that has incidental effects on expression — like a trespass statute or an anti-littering ordinance. It is a law aimed *solely* at expression. It is not a time, place, and manner regulation intended to effectuate non-speech-related purposes.[4] Its entire purpose and effect is to

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[4] "[I]n the context of intellectual property, [the] 'no adequate alternative avenue' test does not sufficiently accommodate the public's interest in free expression. Intellectual property, unlike real estate, includes the words, images and sounds that we use to communicate. . . . Restrictions on the words or images that may be used by a speaker,

regulate the production of information, culture, and knowledge—all aspects of society central to the ambit of the First Amendment. Its operation is by selective prohibition of printing, publishing, or public expressive performance or display. To paraphrase this Court in *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753 (2001), if the regulation of printing, publishing, or public performance of materials one deems interesting, evocative, or insightful is not regulation of pure speech, it is hard to imagine what would be. See *id.*, 121 S.Ct. at 1761. Such regulation requires at least intermediate scrutiny. *Id.*

Copyright has traditionally been justified in relation to the First Amendment as providing "the engine of free expression," *Harper & Row*, 471 U.S. at 558, just as the cable must-carry rules were justified as facilitating the availability of information "from diverse and antagonistic sources." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 192 (1997) ("*Turner II*"). But just as in the *Turner* litigation the Court found it necessary to review Congress's law to see that it indeed facilitated diverse discourse, so too must courts review copyright legislation to assure that it is the engine of free expression and not the vehicle of censorship. This does not mean that every copyright suit would now include a First Amendment component. But it does mean that Congress cannot substantially shift the boundaries of copyright without being subject to heightened scrutiny. At the very least, a law prohibiting a substantial number of speech acts previously permitted under copyright law must pass the kind of scrutiny this Court applied to other laws that directly regulated speech in the name of improving the flow of information in society—like the must-carry rules.

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therefore, are quite different than restrictions on the time, place, or manner of speech." *Cardtoons, L.C. v. Major League Baseball Players Ass'n.*, 95 F.3d 959, 971 (10th Cir. 1996) (citations omitted).

Congress must, at the very least, show that the statute serves an important government interest in a manner no more restrictive than necessary. *Turner I*, 512 U.S. at 662.

Indeed, in the context of copyright, heightened scrutiny is even more important than where it has been applied most vigorously—in the area of media regulation.[5] Vigorous application of the First Amendment is particularly important where there is a substantial fear that Government will protect its own interests or those of some special, over-represented interest. Where media regulation is concerned, usually both the parties burdened and the parties benefited are well represented in the political process. The cable carriers who suffered the burden of the must-carry rules at issue in the *Turner* litigation, for example, participated in the political process that preceded enactment of the challenged statute and rules no less than did the broadcasters who benefited from them. In the context of copyright, however, the benefits and burdens of regulation are distributed in very different patterns. The *benefits* are always clearly articulated by present owners of copyrights. The *burdens* are usually carried by diffuse members of the public, including those not yet born or too young to articulate their interest in a copyright law—such as one of shorter duration—more solicitous of their freedom of expression. The CTEA is a quintessential instance of a rent-seeking statute likely to result from such an imbalance of representation, a fact that could not be more clearly evidenced than by its retroactive application, which provides a tremendous windfall precisely to those parties that lobbied Congress for its passage. Without heightened scrutiny, Congress will of necessity overreach in copyright legislation and understate the burdens it

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[5] *See, e.g., Turner II*; *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

imposes on expressive freedoms. It is the role of the judiciary, removed from the humdrum of political lobbying and presented with concrete instances of the burdens the new law imposes on expression, to provide that backstop against congressional overreaching.

III. The Categorical Exclusion Is Germane To The Holding Below, And Conflicts With A Recent Decision By The Court Of Appeals For The Second Circuit

The refusal to submit the CTEA to any form of First Amendment review is germane to the decision of the Court of Appeals for the D.C. Circuit, and is in conflict with a recent decision of the Court of Appeals for the Second Circuit in *Universal City Studios v. Corely*, 2001 U.S. App. LEXIS 25330 (2d Cir. Nov. 28, 2001). The Act itself extends the term of copyright from life of the author plus fifty years, to life of the author plus seventy years, or where the copyright is initially vested in a corporation, from seventy five to ninety five years. *See* Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998). It does so not only prospectively, but retrospectively as well. *See Id.* § 102 (b) & (d). Had the Court of Appeals subjected this statute, in particular its retrospective application, to First Amendment review, it is highly unlikely that the Act would have been upheld in its entirety, and certainly it would not have been upheld upon such cursory review.

The justification for the Act is substantially weaker by comparison to other statutes that have been held unconstitutional, or that, though upheld, presented hard cases.[6] The Act is passed pursuant to Article I, section 8,

[6] This Court, for example, subjected the must-carry rules to substantially more searching scrutiny than the court below applied to the CTEA, even though the *prima facie* (and, as it turns out, ultimate) economic justification for the must carry rules was substantially more sound than the economic rationale of the retroactive extension of copyright. Another panel of the Court of Appeals for the D.C. Circuit, for example, recently struck down the vertical and horizontal ownership rules imposed by the Federal Communications Commission on cable operators. Those rules—though held insufficiently justified—were based on a substantially more plausible economic rationale than any justification that could be offered in support of the CTEA. *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

clause 8 of the Constitution. Its constitutionally mandated goal is therefore to "supply the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. 558. It is not at all clear that the *prospective* extension of the Act is justifiable as a means to support that end, because the discounted present value of any revenue stream to be captured eight decades or more hence is virtually insignificant. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 323-29 (1970); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 17 J. L. STUD. 325, 361-2 (1988). All one need do to understand this is to evoke the image of a movie producer raising funds for a film by promising investors a return seventy-five or ninety-five years hence.

The *retrospective* application of this dubious extension is practically laughable as a means to supply economic incentives to authors and other creators. It is impossible to create incentives by retroactive extension of the term of protection for works already created. By definition—the works already exist—the incentive subsisting prior to the extension was sufficient to bring them into being. *See* Landes & Posner, at 362; Melville B. Nimmer, *Does Copyright Abridge the First Amendment*

Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180, 1194-95 (1970).

Perhaps there are other good reasons to support this retroactive extension, such as "harmonization" with other countries, or preservation of old works, or some non-laughable argument that the retroactive extension does in some fashion support creativity. It is unnecessary for this Court to prejudge the weight and sufficiency of such hypothetical reasons, because the court below never properly considered them. It is not, in any event, this Court's practice "to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech." *Denver Area Educ. Telecomms. Consort. v. FCC*, 518 U.S. 727, 760 (1996). Instead, all the Court need do is remand the case for consideration in light of the appropriate First Amendment standard.

Stating the correct standard is particularly important in order to resolve a conflict among the circuits. In *Corely*, the Court of Appeals for the Second Circuit recently reviewed Section 1201(a)(2) of the Copyright Act, 17 U.S.C. § 1201(a)(2) against a first amendment challenge. While the Second Circuit upheld that section of the Copyright Act, it did so only after clearly and explicitly subjecting that provision to heightened first amendment scrutiny following the *Turner* standard. 2001 U.S. App. LEXIS 25330, at *62-63.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment below and remand for reconsideration in light of the appropriate First Amendment standard of review.

Respectfully submitted,

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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

I. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, NO. 99-CV-65

1.	1/11/99	Complaint
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4.	6/24/99	Motion for leave to file second amended complaint
5.	6/25/99	Answer to second amended complaint
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7.	6/28/99	Stipulated order granting motion for leave to file second amended complaint
8.	6/28/99	Second amended complaint
9.	7/14/99	Brief by *amici curiae* Sherwood Lit. Trust, Sherwood Anderson, ASCAP, Amsong, Inc., Assoc. Amer. Publish, Broadcast Music Inc., Motion Picture Assn., National Music Pub. Assoc., Recording Industry, And Songwriters Guild as amici curiae in support of defendant's motion for judgment on the pleadings
10.	7/23/99	Plaintiffs' motion for judgment on the pleadings or, in the alternative, for summary judgment (including Declaration of Dennis J. Karjola and Affidavit of Hal R. Varian)
11.	8/23/99	Defendant's memorandum in opposition to plaintiffs' motion for judgment on the pleadings or, in the alternative for summary judgment
12.	8/23/99	Defendant's reply in support of her motion for judgment on pleadings

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14.	9/10/99	Plaintiffs' reply in support of their motion for judgment on the pleadings or, in the alternative, for summary judgment
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16.	10/28/99	Memorandum opinion
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II. UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, NO. 99-5430

1.	12/29/99	Notice of appeal docketed
2.	5/22/00	Appellants' brief
3.	5/22/00	Joint appendix
4.	6/6/00	Brief of *Amici Curiae* Lyman Ray Patterson, Laura N. Gassaway, and Edward Walterscheid in support of appellants
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17.	7/13/01	Opinion on petition for rehearing
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19.	7/13/01	Order denying petition for rehearing
20.	8/1/01	Mandate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, ELDRITCH PRESS, HIGGINSON BOOK COMPANY, JILL A. CRANDALL, TRI-HORN INTERNATIONAL, LUCK'S MUSIC LIBRARY, INC., EDWIN F. KALMUS & CO., INC., AMERICAN FILM HERITAGE ASSOCIATION, MOVIECRAFT, INC., DOVER PUBLICATIONS, INC., and COPYRIGHT'S COMMONS,	)	
Plaintiffs,	)	
v.	)	Case No. 1:99 CV00065 JLG
JANET RENO, in her official capacity as Attorney General of the United States,	)	
Defendant.	)	

SECOND AMENDED COMPLAINT

This is an action for declaratory relief pursuant to 28 U.S.C. § 2201. Plaintiffs seek declaratory judgment that § 102(d)(1)(B) of the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 ("CTEA"), amending 17 U.S.C. § 304(b), is unconstitutional. Plaintiffs also seek preliminary and permanent injunctive relief against the criminal enforcement of § 2(b) of the No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 ("NET Act"), amending 17 U.S.C. § 506(a), with respect to works that would not have a valid copyright but for the enactment of § 102(d)(1)(B) of the CTEA.

PARTIES

1. Plaintiff Eric Eldred resides at 50 E. Derry Rd #21, E. Derry, New Hampshire, 03041-0021.

2. Plaintiff Eldritch Press is a non-profit unincorporated association located at 50 E. Derry Rd #21, E. Derry, New Hampshire, 03041 and found on the Internet at http://eldred.ne.mediaone.net. Eldritch Press's principal activity is to post literary works on the Internet in order to make them freely available to the entire world. Plaintiff Eldred is the Director of Eldritch Press.

3. Plaintiff Higginson Book Company ("Higginson") is located at 148 Washington Street, Salem, Massachusetts, 01970. Higginson is a for-profit sole proprietorship operated by Robert A. Murphy. Higginson reprints books based on consumer demand in fields such as genealogy, historic maps, local and county history, and the Civil and Revolutionary Wars.

4. Plaintiff Jill A. Crandall resides at 134 Buckeye Branch Drive, Athens, Georgia, 30605. Plaintiff Crandall is the choir director at St. Gregory the Great Episcopal Church in Athens, Georgia.

5. Plaintiff Tri-Horn International is a Massachusetts corporation located at 38 Surfside Road, P.O. Box 424, Scituate, Massachusetts, 02055. Tri-Horn International is in the business of developing and selling products involving the history and traditions of golf.

6. Plaintiff Luck's Music Library, Inc. is a Michigan corporation located at P.O. Box 71397, 32300 Edward, Madison Heights, Michigan, 48071. Luck's Music Library, Inc. is in the business of selling and renting classical orchestral sheet music.

7. Plaintiff Edwin F. Kalmus & Co., Inc. is a Florida corporation located at P.O. Box 5011, Boca Raton, Florida,

33431. Edwin F. Kalmus & Co., Inc. publishes orchestral sheet music.

8. Plaintiff American Film Heritage Association is a non-profit film preservation group that was established to represent documentary film makers, film preservationists, scholars, commercial archives and non-profit archives. The American Film Heritage Association is located at P.O. Box 438, Orland Park, Illinois, 60462.

9. Plaintiff Moviecraft, Inc. is a commercial film archive incorporated in Illinois and located at P.O. Box 438, Orland Park, Illinois, 60462.

10. Plaintiff Dover Publications, Inc. is a New York corporation located at 31 East 2nd Street, Mineola, New York, 11501. Dover Publications, Inc. is a large-scale commercial book publisher.

11. Plaintiff Copyright's Commons is a non-profit coalition located on the Internet at http://cyber.law.harvard.edu/cc and at The Berkman Center for Internet & Society, 1563 Massachusetts Avenue, Cambridge, Massachusetts, 02138. Copyright's Commons serves as a collective voice for students, professors, archivists and other members of the public who are concerned about the negative effects of copyright term extensions on the public domain.

12. Defendant Janet Reno is the Attorney General of the United States. Defendant Reno is responsible for the enforcement of the criminal laws of the United States, including the NET Act.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361 and 2201, because this declaratory judgment action challenges the constitutionality of a federal statute. There is personal jurisdiction over

defendant Reno. Venue is properly laid in this District under 28 U.S.C. § 1391(e).

STANDING

14. Plaintiffs have standing to bring and maintain this action because their activities have been, and will continue to be, directly affected by the CTEA. Each of the plaintiffs uses, copies, reprints, performs, enhances, restores or sells works of music, art, film or literature in the public domain. Plaintiffs plan to continue to do so for the indefinite future. Among the works that certain of the plaintiffs were preparing to use in some way were works created in 1923 that, but for enactment of the CTEA, could have been legally copied, distributed or performed on January 1, 1999. The total retail value of such works would have exceeded $1,000.

15. The CTEA can be civilly enforced against plaintiffs and, through the NET Act, criminally enforced as well. In addition, plaintiffs' constitutional rights to freedom of expression have been chilled by enactment of the CTEA.

16. As discussed further below, the combined effects of the CTEA and the NET Act have caused each of the plaintiffs concrete and particularized injuries to their freedom of expression and their ability to use works in the public domain. The chilling effect of these laws is an actual, present injury, and the threat of enforcement against plaintiffs who violate the laws causes an imminent injury. Therefore, plaintiffs have each suffered an injury in fact, and this injury has been caused by their fear of prosecution by Defendant Reno for violations of the NET Act. These injuries can be redressed by a declaratory judgment that the CTEA is unconstitutional and by preliminary and permanent injunctive relief against the criminal enforcement of the NET Act with respect to works that would not have a valid copyright but for the enactment of the CTEA.

BACKGROUND

A. Copyrights And Copyright Terms

17. Article I, § 8 of the United States Constitution confers upon Congress authority:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Pursuant to that authority, Congress has enacted numerous laws since 1790 providing for copyrights upon a variety of literary and artistic works. Those statutes are codified at 17 U.S.C. § 101 *et seq.*

18. The duration of copyrights on literary and artistic works is generally governed by 17 U.S.C. § 301 *et seq.* Until it was amended by the CTEA, 17 U.S.C. § 304(b) provided:

> (b) Copyrights in Their Renewal Term or Registered for Renewal Before January 1, 1978.—The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date the copyright was originally secured.

19. In addition, pursuant to 17 U.S.C. § 305, copyrights are deemed to run to "the end of the calendar year in which they would otherwise expire." Therefore, prior to the enactment of the CTEA, a copyrighted work that was created, for example, on August 20, 1923, if properly renewed, would have had a subsisting copyright between December 31, 1976 and December 31, 1977, and would have had a term of 75 years from the date of the original

copyright. This term would have ended on December 31, 1998.

20. Upon the expiration of a copyright, a work comes into the public domain. This means that it may freely be copied, performed, distributed or used in the creation of derivative works by any person in the United States without the permission, license or authorization of the copyright holder.

B. The Copyright Term Extension Act Of 1998

21. On October 27, 1998, President Clinton signed into law the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827. The CTEA amended 17 U.S.C. § 304 in relevant part as follows:

> (d) Duration of Copyright: Subsisting Copyrights.—
>
> (1) In General.—Section 304 of Title 17, United States Code, is amended-
>
> . . .
>
> (B) by amending subsection (b) to read as follows:
>
> "(b) Copyrights in Their Renewal Term at the Time of the Effective Date of the Sonny Bono Copyright Term Extension Act.—Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured."

These changes to § 304 became effective immediately upon passage of the CTEA.

22. In general, the CTEA added twenty years to the term of most copyrights. Thus, prior to enactment of the CTEA, a work that was copyrighted during 1923 would have entered the public domain on December 31, 1998, because its term of 75 years would have ended. The CTEA,

however, extended the copyright term of such a work to 95 years, meaning that it will not enter the public domain until December 31, 2018.

C. The No Electronic Theft Act

23. The No Electronic Theft Act of 1997 (the "NET Act") criminalizes certain forms of copyright infringement. It amended 17 U.S.C. § 506(a) to provide, in relevant part:

> Section 2. Criminal Infringement of Copyrights.
>
> . . .
>
> "(a) Criminal Infringement.—Any person who infringes a copyright willfully either—
>
> "(1) for purposes of commercial advantage or private financial gain, or
>
> "(2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000,
>
> shall be punished as provided under section 2319 of title 18, United States Code."

24. 18 U.S.C. § 2319(c), in turn, makes it a felony to violate 17 U.S.C. § 506(a)(2):

> (c) Any person who commits an offense under section 506(a)(2) of title 17, United States Code—
>
> (1) shall be imprisoned not more than 3 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of 10 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of $2,500 or more;

> (2) shall be imprisoned not more than 6 years, or fined in the amount set forth in this title, or both, if the offense is a second or subsequent offense under paragraph (1); and
>
> (3) shall be imprisoned not more than 1 year, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000.

25. The No Electronic Theft Act, as its name suggests, was enacted to criminalize the violation of copyrights through the posting of copyrighted materials on the Internet.[1] The No Electronic Theft Act does not, however, merely criminalize the posting of copyrighted materials on the Internet. The statute criminalizes *any* "reproduction or distribution . . . during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000." 17 U.S.C. § 506(a). Therefore, anyone who uses, reproduces or distributes a copyrighted work without permission is subject to the stiff fines and prison terms of the NET Act.

26. The CTEA extended for another 20 years copyrights on all literary, musical and artistic works that, properly renewed, would have been subsisting between December 31, 1976 and December 31, 1977. The NET Act punishes as a felony any violations of such a copyright, if the Act's thresholds are met. Thus, for example, persons who violate

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[1] The Internet is a network of computers that are linked to one another by phone lines, modems and other networking technologies in order to share resources. The Internet has over 100 million users worldwide. The posting of a work on the Internet makes it easy to access, read and copy that work. Because of the popularity of the Internet, moreover, any single copy of a work that is posted on the Internet can be read and copied many times over each month.

the copyright of a work created in 1923 face criminal prosecution.

D. Effect Of The CTEA On Plaintiffs

Eric Eldred and Eldritch Press

27. Eric Eldred founded the Eldritch Press in late 1995 as a means of demonstrating that computers could be used to present books on the Internet in new ways, and in ways that improved upon the capabilities of print books. The Eldritch Press posts books on its Web site[2] located on the Internet at http://eldred.ne.mediaone.net. Initially, the Eldritch Press began with works of American literature, by authors such as Nathaniel Hawthorne, Oliver Wendell Holmes (Sr.), and Henry James. The Eldritch Press also has specialized collections of works such as World War I novels, writings about small boats, French and Russian literature (with some bilingual works), science and natural history, and works appropriate for reading aloud to children. It also has works of general interest, such as H. L. Mencken's "Declaration of Independence in American" and Louisa May Alcott's "An Old-Fashioned Thanksgiving." Because some of the works are not included in library collections or are long out of print, they are not obtainable in any other way. All of the works are in hypertext markup language ("HTML"), are hand-coded, can be found by most common Internet search engines, and are accessible by all Web browsers.

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[2] The "World Wide Web" is a collection of easily accessible files and databases located on servers on the Internet. These servers are known as "Web sites" which provide resources associated with a certain person or organization. An individual or organization with a Web site can "post" a message, document, or other type of information on the Web site. A file that is posted on a Web site generally can, at the discretion of the Web site operator, be opened, read and copied (or "downloaded") by anyone who has access to the Internet.

28. Works are derivative as well as exact reprints. In fact, because of the higher capabilities of electronic books, the Eldritch Press has added features to some of these works. These include color illustrations, notes, links to other Internet sources, bibliographies, modernized translations, glossaries, timelines of dates, maps, essay contests, discussion pages, distance learning via e-mail, all linked back to authoritative texts. All of these works also are accessible to blind readers through text-to-speech equipment. In addition, some of the works include text descriptions of art to further assist the blind.

29. The Eldritch Press Web site is globally accessible. The site receives as many as 4,000 visitors per day and has been accessed from virtually all countries in the world. It was been recognized as one of the 20 best humanities sites on the Web from edSITEment (National Endowment for the Humanities); its Hawthorne and Howells pages have been accepted as links by the Nathaniel Hawthorne Society and the William Dean Howells Society Web sites.

30. All works posted on the Eldritch Press Web site are in the public domain or are posted with the permission of copyright holders. Eldred personally researches each work before it is posted to determine whether it is copyrighted.

31. Eldred and Eldritch Press often post works on the Eldritch Press Web site as soon as the works come into the public domain. Thus, beginning in early 1999, Eldritch Press' Web site would have begun featuring literary works that had been created in 1923, such as "New Hampshire" by Robert Frost, "Horses and Men" by Sherwood Anderson, and "Racundra's First Cruise" by Arthur Ransome. Because of the CTEA's enactment, if Eldred or the Eldritch Press posted such works on the Eldritch Press Web site, they would violate both the work's copyright and the criminal provisions of the NET Act. 17 U.S.C. § 506(a).

32. Eldred and Eldritch Press do not accept donations of money or advertisements. The Eldritch Press, being a non-profit association with a meager budget, does not have the funds to pay for any fine levied against it if it were found guilty of violating the NET Act.

Higginson Book Company

33. The Higginson Book Company is a for-profit sole proprietorship that has been a book dealer since 1969 and has been reprinting books for the last twenty years. Higginson reprints books based on consumer demand in fields such as genealogy, historic maps, local and county history, and the Civil and Revolutionary Wars. Higginson has over 10,000 books available for sale. It focuses on books originally printed in small editions that are no longer in print and therefore difficult to obtain from any other source. Higginson has 30,000 active customers, including individuals, libraries, historians, schools and universities. It is located on the Internet at http://www.higginsonbooks.com.

34. Higginson only reprints works that are in the public domain or with the permission of the copyright holders. Higginson's officers and employees carefully research any book published after 1922 to determine whether or not it is copyrighted, but this is often very difficult given the rarity of the books in which they specialize. Higginson therefore must often wait until a book is in the public domain before it can reprint the book.

35. Higginson expected that works such as "History of Lawrence Massachusetts, with War Records," by Maurice B. Dorgan, copyrighted in 1924, would enter the public domain at the end of 1999. The CTEA prevented such works from entering the public domain for another 20 years. Because of the difficulties in tracking the owners of, or heirs to, the copyrights on old works, the CTEA effectively means that Higginson will be unable to reprint any books

copyrighted in 1923 or after for at least another 20 years. If Higginson were to reprint such books, it would violate the book's copyright and the criminal provisions of the NET Act. 17 U.S.C. § 506(a).

Jill A. Crandall

36. Plaintiff Crandall is the choir director at St. Gregory the Great Episcopal Church in Athens, Georgia. She is responsible for selecting the music and preparing and leading the choir in singing during the worship services.

37. When selecting choir music Ms. Crandall must choose between music she can freely copy because it is in the public domain and music that is copyrighted and therefore requires her to purchase copies for each choir member. Since music typically costs $1.00 to $3.50 per song per choir member, it is much cheaper to copy music that is in the public domain. For this reason she most frequently selects works that were copyrighted before 1923.

38. The CTEA has prevented Crandall from freely copying works that were copyrighted in 1923, including works by such composers as Ralph Vaughan Williams, Gustav Holst, Charles Ives and Edward Elgar. If Crandall were to copy and perform copyrighted music it would violate the work's copyright and she would be subject to a copyright infringement action.

Tri-Horn International

39. Tri-Horn International is a closely-held company started in 1993. Tri-Horn is in the business of developing and selling products relating to the history and traditions of golf. Certain of these products use images of famous golfers or golf scenes.

40. The 1920's were an important decade in the history of golf; therefore many images and other artistic works portraying the sport are from this decade. Tri-Horn

International had planned to use works from 1923 and later years, such as pictures of golfers Bobby Jones and Walter Hagen, and incorporate these works into new products.

41. The CTEA has impeded Tri-Horn's plans to use pictures and other materials from the 1920's in its products. The CTEA's retroactive extension of copyright terms has raised significant problems for Tri-Horn because it is difficult, if not impossible, to research the copyright history of many works and to obtain permission to use them. Therefore some of the products Tri-Horn originally planned to produce may never be made. If Tri-Horn were to copy and make such derivative works without permission, it would be subject to copyright infringement actions as well as criminal prosecution. 17 U.S.C. § 506(a).

Luck's Music Library, Inc.

42. Luck's Music Library, Inc. ("Luck's") specializes in selling and renting classical orchestral sheet music. Luck's sells and rents music to approximately 7,000 orchestras and 12,000 individuals worldwide. The music Luck's distributes ranges from elementary-level to operatic.

43. Much of the music Luck's sells or rents is in the public domain. As a general rule, Luck's sells and rents music in the public domain at much lower prices than copyrighted music. For example, "Alborada Del Gracioso" by Maurice J. Ravel, which was written in 1923, is rented to community orchestras for $360.00 for two performances. Before enactment of the CTEA, Luck's had planned to begin selling the piece for $150.00 (to be performed an unlimited number of times) once it entered the public domain on January 1, 1999.

44. The CTEA prevented the Ravel piece and many others from entering the public domain at the end of 1998, adversely affecting Luck's business. If Luck's were to reproduce and sell such works, it would violate the work's copyright and the criminal provisions of the NET Act. 17

U.S.C. § 506(a). The CTEA also impedes the ability of orchestras, many of which have small annual budgets, from playing these famous works.

Edwin F. Kalmus & Co., Inc.

45. Edwin F. Kalmus & Co., Inc. ("Kalmus") is a for-profit corporation located in Boca Raton, Florida that publishes public domain music for orchestras. Masters Music, a division of the publishing company, specializes in publishing piano, solo and chamber music that is in the public domain. Kalmus has approximately 8,500 active customers.

46. Kalmus publishes a catalog at the beginning of every school year listing the titles of works that will be available for purchase. Kalmus's Fall 1998 catalog contained a list of works that it thought would be available on January 1, 1999, when the works were scheduled to enter the public domain. This list included works by such composers as Bela Bartok, Maurice J. Ravel and Richard Strauss.

47. The CTEA has adversely affected Kalmus's business. After the CTEA was passed, Kalmus was forced to distribute a correction to its catalog to notify its customers that works copyrighted in 1923 would not enter the public domain until January of 2019. Moreover, since Kalmus almost exclusively publishes music that has entered the public domain, Kalmus has been effectively prevented from adding any new works to its catalogs for the next 20 years.

American Film Heritage Association and Moviecraft, Inc.

48. The American Film Heritage Association ("AFHA") is a non-profit film preservation group. The AFHA was established to represent documentary filmmakers, film preservationists, scholars, commercial archives and non-profit archives in opposing copyright term extension laws

because of their significant adverse effects on film preservation, archival stock footage use and documentary film making.

49. Moviecraft, Inc. is a commercial film archive that is in the business of restoring and selling rare older films. Older films, such as those from the 1920's, are constantly deteriorating and in need of restoration. The Library of Congress has defined many of these films as "Orphan Works" because they are not being exploited by anyone; thus, while the films may be under copyright, the companies that produced them are no longer in existence or they have abandoned these films because of their age or ephemeral nature. Orphan Works make up a significant portion of the body of silent films.

50. Because the CTEA extends the copyrights on many of these films for 20 more years, Moviecraft will be unable to restore these films and many of them will be lost forever. If a surviving print of one of these works from the 1920's were discovered by Moviecraft, it could not be restored because Moviecraft could not exploit the film without authorization of the copyright owner. To acquire copyright clearances often is impossible. In the case of Orphan Works, the film preservationist cannot find a copyright owner because so much time has elapsed. For example, Moviecraft has a partial print of the film "Dixie," a civil war drama produced in 1924. Moviecraft had originally planned to restore this film when it was scheduled to enter the public domain at the end of 1999. Now, however, since "Dixie" will not enter the public domain for 20 more years, Moviecraft cannot restore the footage without exposing itself to actions for copyright infringement and criminal prosecution. 17 U.S.C. § 506(a).

Dover Publications, Inc.

51. Dover Publications, Inc. ("Dover") is a large-scale publisher of paperback books including adult fiction and

children's books. Dover currently has approximately 6,500 titles in print, and an average of 400 new titles are added each year. Dover annually sells approximately 15,000,000 copies, and it has a current inventory of over 10,000,000 books.

52. Dover enjoys a considerable reputation for making English-language and translated foreign-language books readily available to interested readers at affordable prices when sold either through local bookstores or directly to catalog customers. Approximately one-third of Dover books are reprints from public domain sources, many of which would otherwise be completely out-of-print.

53. Dover had considerable plans, based on extensive research, to republish works from the 1920's and 1930's in the coming years when they were to enter the public domain. For example, this year Dover had planned to republish works copyrighted in 1923 such as "The Prophet" by Kahlil Gibran, 'The Harp-Weaver and Other Poems" by Edna St. Vincent Millay and "Tulips and Chimneys" by e.e. cummings. The CTEA has prevented Dover from republishing these works at reasonable price levels for twenty more years. If Dover were to republish these works without permission from the copyright holders it would be subject to criminal prosecution under the NET Act as well as actions for copyright infringement.

Copyright's Commons

54. Copyright's Commons is a non-profit coalition located at the Berkman Center for Internet and Society at Harvard Law School. The coalition is devoted to promoting the public availability of literature, art, music and film. Copyright's Commons serves as a collective voice for students, professors, archivists and members of the public who are concerned about the CTEA's negative effects on a vibrant public domain. Membership in Copyright's

Commons is open to any person by means of its web page, located at http://cyber.law.harvard.edu/cc.

55. Members of Copyright's Commons routinely use, reproduce, reprint, perform, enhance, restore or sell works of music, art, film or literature in the public domain. Because the CTEA has prevented works from the 1920's and 1930's from entering the public domain for another 20 years, members of Copyright's Commons who had planned to use or reproduce works created in 1923 have been prevented from doing so for fear of being sued for copyright infringement or prosecuted under the NET Act. 17 U.S.C. § 506(a).

COUNT ONE

56. Plaintiffs repeat and reallege paragraphs 1 through 55.

57. The copyright laws grant the owners of a copyright in a literary, artistic or musical work the exclusive right to reproduce, distribute, perform, or display that work, or derivative works. 17 U.S.C. § 106. Therefore, the posting of a copyrighted literary work on the Internet, the selling of a copyrighted literary work, the copying and selling of copyrighted music, the use of a copyrighted artistic work in creating a new work, or the restoration and selling of a copyrighted film, without the permission of the copyright owner, would be copyright infringement pursuant to 17 U.S.C. § 501 *et seq*.

58. Article 1, Section 8 of the United States Constitution grants Congress the authority to:

> To promote the Progress of Science and useful Arts, by securing for *limited* Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

(Emphasis supplied). The purpose of this grant of power to Congress was to empower Congress to pass laws granting a limited monopoly over original works of authorship in order to provide incentives to artists, authors, composers, inventors, playwrights, poets, and sculptors to produce new works. Any grant of exclusive rights then (a) must be for this limited purpose, by granting (b) a limited term (c) to authors. A grant of an exclusive right that was not for this limited purpose, or was not for a limited term, or was not a grant to authors, would fall outside the narrow exception to the Free Speech and Press Clause of the First Amendment established by the Copyright Clause.

59. The historical antecedents of the Constitution, the record of the deliberations surrounding the drafting and adoption of the Constitution and contemporaneous evidence explaining the background and context of this language confirm this plain reading of Article I, § 8, and demonstrate that the clause was designed to assure that a balance was struck between providing incentives to "Authors and Inventors" on the one hand, and assuring the eventual and inevitable entry of their work into the public domain.

60. Despite these requirements that the term of copyright be limited, and the purpose be to "promote the progress of science and useful arts," Congress has repeatedly extended the term of copyright, both prospectively (to works not yet in existence), and retrospectively (to works with subsisting copyright terms). It has, in other words, given future authors a longer period to recover for any works they copyright in the future, and it has given past authors a longer period to recover for works they already have produced.

61. The present term is far longer than the framers ever envisioned. The original copyright statute of 1790 granted copyright terms of 14 years, with a 14 year renewal period. In 1831 the original copyright term was extended to 28 years, while the renewal term remained at 14 years. The

renewal term was lengthened from 14 to 28 years in 1909, creating a total possible copyright term of 56 years. There it stayed for more than half a century.

62. Beginning in 1962, Congress enacted a succession of laws that extended copyright terms for those copyrighted works whose terms were about to expire. The overall effect of these laws was to extend copyright terms to periods as long as 70 years. Then, in 1976, Congress enacted Pub. L. 94-553 which gave subsisting copyrights a total term of 75 years. Finally, the CTEA extended this 75-year term by 20 more years. The following table chronicles the extensions of the copyright terms:

Year	Law	Copyright Term Extension	Maximum Copyright Term
1962	Pub. L. 87-668	Subsisting copyrights extended to 12/31/65	59 years
1965	Pub. L. 89-142	Subsisting copyrights extended to 12/31/67	61 years
1967	Pub. L. 90-141	Subsisting copyrights extended to 12/31/68	62 years
1968	Pub. L. 90-416	Subsisting copyrights extended to 12/31/69	63 years
1969	Pub. L. 91-147	Subsisting copyrights extended to 12/31/70	64 years
1970	Pub. L. 91-555	Subsisting copyrights extended to 12/31/71	65 years
1971	Pub. L. 92-170	Subsisting copyrights extended to 12/31/72	66 years
1972	Pub. L. 92-566	Subsisting copyrights extended to 12/31/74	68 years
1974	Pub. L. 93-573	Subsisting copyrights extended to 12/31/76	70 years
1976	Pub. L. 94-553	Subsisting copyrights extended to 75 year total term	75 years
1998	Pub. L. No. 105-298	Subsisting copyrights extended to 95 year total term	95 years

63. While formally, under each of these extensions, the term is limited, the practice of continually extending copyright terms retroactively means that Congress, in effect, is granting copyright holders more than a "limited term."

64. Because these retroactive extensions are for works that already exist, they do not "promote the progress of science and useful arts."

65. The CTEA therefore violates the restrictions of Article I, § 8 and is unconstitutional.

(a) The CTEA confers benefits retroactively. This can have no rational basis, since no incentive to future individual creativity is provided by conferring an economic reward upon someone who has already created the work in question.

(b) The CTEA confers benefits to someone to whom the creator of the work transferred or sold the rights in the work in a transaction that contemplated a shorter copyright term. This is outside the constitutional power to grant rights to "Authors" and this too can create no incentive to future individual creativity.

(c) Whatever may be said about the benefits living authors can receive from continued royalties for preexisting works whose term of protection has been retroactively extended, the same may not be said about dead authors. Since dead authors cannot create new works, the sole incentive that copyright is intended to provide—bringing new works to market—cannot be fulfilled. Nevertheless, Congress has retroactively bestowed the extended term on assignees of dead authors, violating the constitutional limitation of promoting the progress of science.

66. Since the unconstitutional sections of the CTEA are not severable from the remainder of the CTEA, the entire act must be declared unconstitutional.

67. A declaratory judgment will terminate the controversy between the parties.

COUNT TWO

68. Plaintiffs repeat and reallege paragraphs 1 through 55.

69. While copyright creates a present interest in the copyright holder, it simultaneously creates a future interest in the public. The Public Trust Doctrine holds that government may not transfer the public property of a commons into private hands in the absence of any public benefit in exchange. While this doctrine has traditionally been applied in the context of public lands, the same principle should apply to the reallocation of public rights in intangible property, such as copyright.

70. The retroactive extension of the CTEA transfers those future interests from the public to private parties. The free use of such works by the public as a whole, contemplated both by the public and the creators of the works under copyright terms prevailing at the time of the works' creation, is thus pretermitted.

71. The only legitimate aim that Congress may have in effecting a transfer of public intangibles is that aim specified in the copyright clause—to "promote the progress of science and the useful arts." A retroactive extension will not promote that progress.

72. The retroactive extension of the term of copyrights attempted by Section 102(d)(1)(B) of the CTEA is therefore an abdication by the government of control of public resources held for the common use in violation of the Public Trust Doctrine.

73. Since the unconstitutional sections of the CTEA are not severable from the remainder of the CTEA, the entire act must be declared unconstitutional.

74. A declaratory judgment will terminate the controversy between the parties.

COUNT THREE

75. Plaintiffs repeat and reallege paragraphs 1 through 55.

76. The First Amendment restricts Congress's power to "make" any law "abridging the freedom of speech, or of the press."

77. The CTEA restricts plaintiffs' speech. But for the CTEA, plaintiffs could, without threat of legal punishment, publish works originally copyrighted in 1923, and whose copyrights are presently subsisting. If the CTEA stands, plaintiffs can only publish such works with the permission of the copyright holder.

78. Whether the restrictions of the CTEA are consistent with the requirements of the First Amendment depends upon the application of First Amendment principles to the statute.

79. Whether the CTEA is considered a content-based restriction on speech, or a content-neutral restriction on speech, it restricts speech unconstitutionally. Even under the lesser standard of intermediate scrutiny, the government cannot establish that the CTEA "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than is necessary to further those interests." *Turner Broadcasting Systems v. FCC*, 520 U.S. 180, 189 (1997).

80. Since the unconstitutional sections of the CTEA are not severable from the remainder of the CTEA, the entire act must be declared unconstitutional.

81. A declaratory judgment will terminate the controversy between the parties.

WHEREFORE, plaintiffs Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus Co., American Film Heritage Association, Moviecraft, Inc., Dover Publications, Inc. and Copyright's Commons request that this Court enter judgment:

1. Declaring that 17 U.S.C. § 304(b), as amended by the CTEA, is unconstitutional;

2. Enjoining defendant, her successor and their subordinates from enforcing the NET Act, 17 U.S.C. 506(a), against persons whose infringement of a copyright would not have happened but for the CTEA's amendment of 17 U.S.C. § 304(b);

3. Awarding plaintiffs the costs of this action, including reasonable attorneys' fees; and

4. Awarding such further relief as the Court deems just and appropriate.

Dated: June 24, 1999

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	1:99CV00065 JLG
JANET RENO, in her official capacity as Attorney General of the United States,	)	
	)	
Defendant.	)	

ANSWER TO SECOND AMENDED COMPLAINT

Defendant Janet Reno, Attorney General of the United States, hereby answers plaintiffs' Second Amended Complaint in this action as follows:

FIRST DEFENSE

Plaintiffs' Second Amended Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

In response to the introductory paragraph of plaintiffs' Second Amended Complaint, defendant admits that plaintiffs seek the relief described therein, and denies that plaintiffs are entitled to such relief. Defendant answers the numbered paragraphs of plaintiffs' Second Amended Complaint as follows:

1. - 11. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

12. Admitted.

13. The first sentence contains plaintiffs' conclusions of law regarding the Court's subject matter jurisdiction, in response to which no answer is required, but insofar as an answer may be deemed required, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this sentence. The second sentence is denied, except to admit that there is personal jurisdiction over defendant in her official capacity as Attorney General of the United States. The third sentence is admitted.

14. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

15. In response to the first sentence, defendant admits that there are civil and criminal remedies for infringement of copyrights, the duration of which was extended by the CTEA. The second sentence is denied.

16. The allegations in this paragraph are denied, except defendant lacks knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegation that they fear prosecution by defendant for violations of the No Electronic Theft Act of 1997 ("NETA").

17. Admitted.

18. The first sentence is admitted. The second sentence is denied, except to admit that the quoted passage was in effect during the period between January 1, 1978 and October 26, 1998.

19. Admitted.

20. The first sentence is admitted. The second sentence is denied, except to admit that works in the public domain are not subject to copyright restrictions unless they are derived from an underlying work that remains subject to a valid copyright.

21. Admitted.

22. The first sentence is admitted. The second sentence is denied, except to admit that, if the Sonny Bono Copyright Term Extension Act of 1998 ("CTEA") had not been enacted, the term of copyrights secured in 1923, and subsequently renewed, would have expired on December 31, 1998. The third sentence is admitted.

23. This paragraph contains plaintiffs' characterization of the NETA, Pub. L. No. 105-147, 111 Stat. 2678, in response to which no answer is required, but insofar as an answer may be deemed required, defendant admits that the quoted passage appears in 17 U.S.C. § 506(a), as amended by the NETA.

24. This paragraph contains plaintiffs' characterization of 18 U.S.C. § 2319(c), in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied, except to admit that the quoted passage appears in that section.

25. This paragraph contains plaintiffs' characterization of the NETA, Pub. L. No. 105-147, 111 Stat. 2678, in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied except to admit that 17 U.S.C. § 506(a), as amended by the NETA, encompasses the "reproduction or distribution, including by electronic means," of copyrighted works in the circumstances identified in the statute. The Court is respectfully referred to the cited provisions for a complete and accurate statement of their contents. In response to footnote 1 of this paragraph, defendant admits the allegations in the first sentence, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations, except to admit that certain information posted on the Internet can be read and copied many times over each month.

26. The first sentence is denied, except to admit that the CTEA extended for 20 years certain copyrights on literary, musical and artistic works, including certain copyrights with renewal terms subsisting between December 31, 1976 and

December 31, 1977. The second and third sentences contain plaintiffs' characterization of the NETA, Pub. L. No. 105-147, 111 Stat. 2678, in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

27. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except defendant admits the allegations contained in footnote 2 of this paragraph.

28. - 30. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

31. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

32. - 34. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

35. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

36. - 40. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

41. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of this paragraph. The second sentence is denied, except defendant lacks knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegation that plaintiff Tri-Horn International has encountered difficulties in researching the copyright history of, and obtaining permission to use, many unspecified works. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph, except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

42. - 43. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

44. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

45. - 49. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

50. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

51. - 52. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

53. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except to admit that 17 U.S.C. § 506(a), as amended by the NETA, provides that certain types of willful copyright infringement specified in the statute shall be punished as provided under section 2319 of Title 18.

54. - 55. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in these paragraphs.

56. In response to this paragraph, defendant incorporates herein by reference her answers to paragraphs 1 through 55 of plaintiffs' Second Amended Complaint.

57. This paragraph contains plaintiffs' characterization of 17 U.S.C. §§ 106 and 501 et seq., in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied, except to admit that the cited provisions confer the rights and impose the obligations stated in those provisions.

58. The first three sentences of this paragraph contain plaintiffs' characterizations of, and legal conclusions concerning, Article I, Section 8 of the United States Constitution, in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied, except to admit that Article I, Section 8 of the Constitution empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The fourth sentence is denied.

59. The allegations in this paragraph are denied, except to admit that, pursuant to Article I, Section 8 of the Constitution, Congress is empowered to determine what balance should be struck between providing incentives to "Authors and Inventors" and providing for the eventual entry of their work into the public domain.

60. The first sentence is denied, except to admit that, consistent with the requirements of Article I, Section 8, of the Constitution, Congress has enacted legislation to "promote the Progress of Science and useful Arts" by extending for a limited term both copyrights for works not yet in existence and existing works with subsisting copyright terms. The second sentence is admitted.

61. The first sentence is denied. The remaining allegations in this paragraph are admitted.

62. The first three sentences are admitted. The fourth sentence is denied, except to admit that the CTEA extended the term of a subsisting pre-1978 copyright to 95 years from the date the copyright was originally secured. The fifth sentence is admitted, except defendant affirmatively avers that none of the public laws referenced in this sentence altered or affected the term of any presently effective copyright with the exception of those enacted in 1976 and 1998.

63. The allegations in this paragraph are denied, except to admit that, under each of these extensions, the term is limited.

64. Denied.

65. The allegations in this paragraph are denied, and the Court is respectfully referred to the CTEA for a complete and accurate statement of its contents.

66. Denied.

67. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except defendant denies that plaintiffs are entitled to a declaratory judgment or to any relief whatsoever.

68. In response to this paragraph, defendant incorporates herein by reference her answers to paragraphs 1 through 55 of plaintiffs' Second Amended Complaint.

69. The first sentence is denied, except to admit that a copyright creates an interest in the copyright holder for a limited term prescribed by statute after which the copyrighted work falls within the public domain. The second and third sentences are denied.

70. The first sentence is denied. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of this paragraph, except to admit that the copyright laws place restrictions on the use of copyrighted works for the period during which the copyright remains effective and during any extensions of that period.

71. - 73. Denied.

74. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except defendant denies that plaintiffs are entitled to a declaratory judgment or to any relief whatsoever.

75. In response to this paragraph, defendant incorporates herein by reference her answers to paragraphs 1 through 55 of plaintiffs' Second Amended Complaint.

76. This paragraph contains plaintiffs' characterization of the First Amendment to the United States Constitution, in response to which no answer is required, but insofar as an answer may be deemed required, the allegations are denied, except to admit that the quoted language has been excerpted from the First Amendment. The Court is respectfully referred to the text of that amendment for a complete and accurate statement of its contents.

77. The first sentence is denied, except to admit that the Copyright Act, as amended by the CTEA, places certain restrictions on the use of copyrighted works. The second sentence is denied, except to admit that, but for the CTEA, copyright restrictions on the publication of certain works copyrighted in 1923, whose copyrights are presently subsisting,

would have expired on December 31, 1998. The third sentence is denied, except to admit that, if the CTEA stands, plaintiffs may publish copyrighted works with the permission of the copyright holder.

78. Denied, except to admit that the restrictions of the CTEA are consistent with the requirements of the First Amendment.

79. - 80. Denied.

81. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except defendant denies that plaintiffs are entitled to a declaratory judgment or to any relief whatsoever.

Defendant denies all allegations in plaintiffs' Second Amended Complaint not otherwise answered herein. In addition, defendant denies that plaintiffs are entitled to the relief sought in the prayer for relief in plaintiffs' Second Amended Complaint, or to any relief whatsoever.

WHEREFORE, defendant respectfully requests that plaintiffs' prayer for relief be denied, that this action be dismissed, and that defendant be awarded her costs and such other relief as may be appropriate.

Respectfully submitted.

DAVID W. OGDEN
Acting Assistant Attorney General

WILMA A. LEWIS
United States Attorney

/s/
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, ELDRITCH PRESS, HIGGINSON BOOK COMPANY, JILL A. CRANDALL, TRI-HORN INTERNATIONAL, LUCK'S MUSIC LIBRARY, INC., EDWIN F. KALMUS & CO., INC., AMERICAN FILM HERITAGE, ASSOCIATION, MOVIECRAFT, INC., and COPYRIGHT'S COMMONS,	)	
Plaintiffs,	)	Case No. 1:99CV00065 JLG
v.	)	
JANET RENO, in her official capacity as Attorney General of the United States,	)	
Defendant.	)	

DECLARATION OF DENNIS S. KARJALA

STATE OF ARIZONA)
) ss.:
COUNTY OF COCONINO)

Dennis S. Karjala, under the penalties of perjury, declares:

1. My name is Dennis S. Karjala. I am a Professor of Law at Arizona State University, where my primary field of research and writing is copyright law. From 1993 I was active in opposing legislative adoption of what eventually became the

Sonny Bono Copyright Term Extension Act of 1998 (CTEA). In the course of these activities, numerous examples have come to my attention showing the reliance of current authors on the public domain in creating new works, as well as transaction costs to the public resulting from copyright protection. These examples are all drawn from publicly available sources. I make this declaration in support of plaintiffs' motion for entry of judgment on the pleadings or, in the alternative, summary judgment.

2. The Disney Corporation has based many popular films on public domain stories or music:

The Adventures of Ichabod and Mr. Toad (based on the stories by Washington Irving)
Aladdin (old folk tale)
Alice in Wonderland (based on the book by Lewis Carroll)
Beauty and the Beast (old folk tale)
Cinderella (old folk tale)
Fantasia (Stravinsky's Rite of Spring music, in the public domain in the U.S.)
Hercules (based on mythical Greek character)
The Hunchback of Notre Dame (based on the novel by Victor Hugo)
The Little Mermaid (old folk tale)
Mulan (Chinese folk tale)
Pinocchio (old folk tale)
Pocahontas (historical character, in the public domain)
Sleeping Beauty (old folk tale)
Snow White and the Seven Dwarfs (old folk tale)
Tarzan (public domain character used as basis for new story)
The Three Musketeers (public domain novel)
Twenty Thousand Leagues Under the Sea (public domain novel)

3. Many other films and popular plays and musicals have been made based on, and often changed from, public domain works. A few examples include:

2001, A Space Odyssey (new film using public domain music)
The Brothers Karamazov (based on the Dostoyevsky novel)
Clueless (derived from Jane Austen's *Emma*)
Dracula (based on the public domain character)
Godspell (musical based on the Gospel according to St. Matthew, also making use of at least three sets of public domain song lyrics, "Day by Day" attributed to St. Richard of Chicheseter (1197-1253), "When Wilt Thou Save the People" by Ebenezer Elliot (1781-1849), and a public domain translation by Jane Montgomery Campbell (1817-1878) of the public domain song "Das Bauernlied" by German poet Matthias Claudius (1740-1815)
Island of Dr. Moreau by H.G. Wells was the basis of three feature films:
Island of Lost Souls (1933)
Island of Dr. Moreau (1977)
Island of Dr. Moreau (1996)
Jesus Christ Superstar (musical based on the Bible)
Les Miserables (musical based on the Victor Hugo classic)
Miss Saigon (based on Madame Butterfly)
Of Human Bondage (1934 with Betty Davis and 1964 with Kim Novak, based on the novel by W. Somerset Maugham)
Ragtime (play based on public domain music)
Rosencrantz and Guildenstern are Dead (derived from Hamlet)
The Scarlet Letter (derived from the Hawthorne novel)
Sense and Sensibility (based on the novel by Jane Austen)

The Seven Percent Solution (based on the character Sherlock Holmes)
The Sting (new film using public domain music of Scott Joplin)
The Ten Commandments (derived from the Bible)
Tess of the D'Urbervilles (based on the novel by Thomas Hardy)
The Three Musketeers (eight films have been based on the novel by Dumas, 1916, 1921, 1933, 1935, 1939, 1948, 1974, and 1993 (Disney))
Twenty Thousand Leagues Under the Sea (1916 & 1954 (Disney), based on the novel by Jules Verne, plus two completely different made for TV films in 1998)
West Side Story (musical derived from Romeo and Juliet)
The Wings of the Dove (based on the novel by Henry James)

4. Frank Capra's film *It's a Wonderful Life* was virtually unknown when its copyright lapsed on February 6, 1975 due to failure of the copyright owner to renew the copyright. Since then the film has experienced a hugely expanded interest. As many as 100 companies have offered *It's a Wonderful Life* on video, and it was widely shown on television, beginning from Thanksgiving through the entire Christmas season. (It is not seen as much anymore because of claimed copyright rights in the underlying unpublished story.) The film is now a widely loved classic.

5. Nitrate motion picture stock, on which all films were printed at least until very recent times, assures the eventual decomposition of the original negative as well as surviving prints. Many motion pictures and videotapes exist only in single negatives or master tapes, subject to decomposition. These include countless numbers of abandoned and long-forgotten feature films, short subjects, non-theatrical business and educational films, documentaries, and scientific and research footage. Many films, especially silent films from the 1920's, no longer exist even in a single copy because of deterioration.

6. Small suppliers of public domain films can successfully release silent film titles in low volume, in part due to their low overhead and in part because they have to pay no royalties. These small public domain motion picture dealers naturally compete on price, but because they offer a motion picture product to select niche audiences, they seek to compete in terms of quality as well. For example, one company offers public domain films along with original previews and reproductions of lobby cards and posters. Several offer videos that, according to their advertising, are made from high quality 35mm prints. Thus, one can shop for a public domain movie on videotape simply based on price, but one can seek the best motion picture reproductions possible as well as ancillary materials. Douglas Gomery, ***Research Report: The Economics of Term Extension for Motion Pictures,*** submitted for the Committee for Film Preservation and Public Access to the Copyright Office in connection with Docket No. RM 93-8, Notice of Inquiry on Duration of Copyright Term of Protection, November 1993 (available at <http://www.public.asu.edu/~dkarjala/commentary/gomery.html>).

7. Book publishers also compete with lower prices and adding ancillary materials once a work goes into the public domain. In practically any bookstore one can find various production-quality versions of classics like *Moby Dick,* from relatively cheap paperback versions to elegantly bound hardbacks. Even among the paperbacks one finds distinctions based on accompanying commentary, introductions, notes, and maps. When a work goes into the public domain, there are almost immediately available several new versions that seek to distinguish themselves to the buying public by making variations along the dimensions of price, production quality, and ancillary materials.

8. The character Santa Claus as we now know him, was the creation of the great 19th-century American cartoonist Thomas Nast, who started from an austere European Father Christmas figure, in the public domain, and transformed him into the

jovial, roly-poly figure that we know today. Uncle Sam was also a creature of Thomas Nast, who took the name "Uncle Sam" and its general patriotic associations from public domain usage and created the image that we know today, which first appeared in an 1868 issue of Harper's magazine. Adam Gopnik, ***The Man Who Invented Santa Claus,*** The New Yorker, Dec. 15, 1997, at 84; Steve Cannon, ***Letter to The Mail,*** The New Yorker, January 19, 1998, at 7. Nast died around 1902, and had the CTEA been in effect in Nash's time, his rights to both Santa Clause and Uncle Sam would have continued until 1973.

9. The works of the American composer George Gershwin were published between 1923 and 1937. Their U.S. copyrights would have expired between 1999 and 2013 under prior law. George Gershwin died in 1937, so all of his works will go into the public domain in Europe no later than 2008, which is near the middle of the prior U.S. range. Under the CTEA, Gershwin's U.S. copyrights will continue until the years 2019 to 2033, although all Gershwin copyrights will have expired in Europe, notwithstanding extension there, in 2008.

10. Sir Arthur Conan Doyle, author of the famous Sherlock Holmes mysteries, died in 1930. Even with the extended copyright in Europe, all of his works will go into the public domain there at the end of the year 2000. His last work was published in 1927, so it was scheduled to go into the public domain in the United States at the end of the year 2002, about the same time as the revived European copyrights on his entire oeuvre. Under the CTEA, those works of Conan Doyle published after 1922 will remain under U.S. copyright for an additional 20 years, long after their expiration in their country of origin.

11. Prices for community and youth orchestras before and after classical works have entered the public domain indicate how consumer costs come down when works enter the public domain. In the table below, the "rental price" was that charged for community and youth orchestras (financially larger

orchestras had to pay more) for two public performances of the music listed. The "current cost" shows the price of the sheet music from Luck's Music Library after the work entered the public domain (at which point the orchestra could perform the work as often as it liked).

Author	Composition	Rental Price	Year in Public Domain	Current Cost
Ravel	Daphnis et Chloe Suite # 1	$ 455	1987	$ 155
Ravel	Mother Goose Suite	$ 540	1988	$ 70
Ravel	Daphnis et Chloe Suite # 2	$ 540	1989	$ 265
Griffes	The White Peacock	$ 335	1993	$ 42
Puccini	O Mio Babbino Caro	$ 252	1994	$ 26
Respighi	Fountains of Roam	$ 441	1994	$ 140
Respighi	Ancient Aires & Dances Ste. # 1	$ 441	1996	$ 85
Elgar	Cello Concerto	$ 550	1997	$ 140
Holst	The Planets	$ 815	1997	$ 300

12. Composers commonly adapt, arrange, or harmonize earlier melodies. Johann Sebastian Bach (1685-1750), for example, was a frequent arranger of older sacred melodies. Bach's arrangement of ***Herzlich tut mich verlangen,*** by Hans Leo Hassler (1564-1612) was itself used by popular songwriter Paul Simon in one of his songs. Humorist John Forster then used the same melody in "Fusion," a satirical comment on Paul Simon's habits of self-promotion. The great American composer Aaron Copeland uses the Shaker melody ***Simple Gifts*** by Joseph Brackett, Jr. (1797-1882) in ***Appalachian Spring.*** The freedom to express oneself using well known melodies or words adapted to new uses is one of the more important features that the public domain brings to current authors.

13. In religious music, lyricists often write additional verses to earlier hymns. For example, under hymn number eighty-one in the Episcopal Church's ***Hymnal 1982*** is the following note: "Words: St. 1-2, German, 15th cent.; tr. Theodore Baker (1851-1934) st. 3, Friedrich Layritz (1808-1859), tr. Harriet Reynolds Krauth Spaeth (1845-1925); ver. Hymnal 1940." Thus, one named author, two named translators, at least one anonymous author, and one church committee, their generations spanning a period of some five hundred years from first to last, all had a hand in putting the words of the hymn into their present form.

14. Old words are often fitted to new melodies for church-hymnals. For example, the words "Come my Way, my Truth, my Life," by George Herbert (1593-1633), are set in the Episcopal Church's ***Hymnal 1982*** to ***The Call,*** an adaptation by E. Harold Geer of a melody by Ralph Vaughan Williams (1872-1958), which was written for these words as part of a suite entitled ***Five Mystical Songs*** (1911). New words are fitted to old melodies, and old words and old melodies are brought together to create a new work. For example, the words "Turn back, O man, forswear thy foolish ways" by Clifford Bax (1886-1962) were written for the 16th-century hymn-tune ***Old 124th.*** These words by Bax were set to still another melody by Stephen Schwartz for the off-Broadway musical ***Godspell.*** (The words used in ***Godspell*** were published in 1919 as part of a work by Gustav Holst (1874-1934).) The hymn-lyric ***O Little Town of Bethlehem*** was written in 1868 by Phillips Brooks (1835-1893), rector of Holy Trinity Church, Philadelphia, and was early set to the melody ***St. Louis*** composed by Lewis H. Redner (1831-1908), who was the organist at the same church. The words are still widely sung to this melody. In recent decades, however, the words have also become associated with a 19th-century English folk tune, ***The Plowboy's Dream*** or ***Forest Green,*** collected early in this century by composer and folk song collector Ralph Vaughan Williams (1872-1958). See The Hymnal 1940 Companion, Church Pension Fund, New York, 1949, p. 17. 389, 539, and Journal of the Folk Song Society #8, 1906, p. 203.

15. Compilers and publishers also benefit from the timely expiration of copyright. After expiration of copyright in *The Sacred Harp* (first edition 1844), at least three different compilers attempted to capture a share of the market for new editions. Revisions of *The Sacred Harp* were produced by William M. Cooper *(The Sacred Harp, Revised and Improved,* 1902), J. L. White *(The New Sacred Harp,* 1884, co-edited by White's brother, B. F. White, Jr; *Fifth Edition of the Sacred Harp,* 1910; and *Fourth Edition of the Sacred Harp,* with Supplement, 1911), [,] and Joseph James, *The Original Sacred Harp,* 1911). Public domain status of *The Sacred Harp* allowed for the free inclusion into other hymnals of many individual hymns from *The Sacred Harp* and other pre-Civil War hymnals. The Episcopal Church's *Hymnal 1982,* for example, contains a number of tunes from pre-Civil War American hymnals.

16. The 1998 version of *Guitar for Dummies* by Mark Phillips and John Chappell (IDG Books, publisher) takes all or nearly all of its musical examples from the public domain. By using only public domain examples, authors can speed up the publishing timetable and reduce the transaction costs of both negotiating a license and the monetary costs of royalties. Thus, because the book attempts to teach how to play a musical instrument, the public domain also serves as a device for promoting learning.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on July 22, 1999.

/s/ _____
DENNIS S. KARJALA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, ET AL.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:99CV00065 JLG
	)	
JANET RENO	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT OF HAL R. VARIAN

I, HAL R. VARIAN, make oath and say as follows:

1. I am the Dean of the School of Information Management and Systems at the University of California, Berkeley. I hold joint appointments in the Haas School of Business and the Department of Economics and occupy the Class of 1944 University Professorship. I received my S.B. degree from MIT in 1969 and my M.A. and Ph.D. from UC Berkeley in 1973. I have published numerous papers in economic theory, econometrics, industrial organization, public finance, and the economics of information technology. I have been asked by the plaintiffs to provide my opinion on the extent to which the term extensions provided by the Copyright Term Extension Act of 1998 provide additional economic incentives to authors to produce creative works.

2. The decision to invest in producing a creative work is influenced in part by economic considerations. Investing time and money now produces a cash flow in the future, so one must trade off the time and money invested now with the potential returns in the future.

3. In my opinion, extending current copyright terms by 20 years for new works has a tiny effect on the present value of cash flows from creative works and will therefore have an insignificant effect on the incentives to produce such works.

4. In my opinion, there is no economic rationale for applying copyright extension to pre-existing works. The incentives to produce these works are those that existed at the time of creation. If these incentives were deemed adequate at the time, there is no additional social benefit from extending them retrospectively. I base these opinions on the following.

Present Value

5. The economic concept of "present value" offers a way to evaluate future cash flows. If the rate of interest is 10 percent per year, one dollar invested today has a "future value" of $1.10 next year. Conversely, $1.10 next year has a "present value" of one dollar today, and $1 next year has a "present value" of 1/1.10 .91 today. Said another way, 91 cents today will grow into approximately $1 next year at a 10% rate of interest. One dollar invested today will grow to 1.10 x 1.10 1.21 in 2 years; hence $1.21 delivered two years from now is equivalent in present value to $1 today, and $1 in two years is equivalent to approximately 1/1.21 83 cents today. More generally, $1 today grows to (1+r)^n in n years, so that $1 in the future has a present value of 1/(1+r)^n today.

The Value of an Investment

6. At a 10 percent rate of interest, the present value of $1 dollar received 50 years from now is about 0.0085 dollars, or less than 1 cent. This means that an investment that requires spending more than 1 cent now in return for a dollar 50 years in the future is not attractive from an economic point of view.

7. Most investments return a stream of payments rather than a single lump sum payment at some future date. To calculate the present value of such a stream, we must add up the present

values of each individual payment for the year when it will be received.

8. As an example, can calculate the value of $1 received each year for 1-50 years and for the subsequent 51-75 and 76-95 years by summing up the present values of each of these receipts. The following chart summarizes the results of such a calculation, assuming four different interest rates.

	TIME PERIOD		
Interest Rate	**1-50 Years**	**51-75 Years**	**76-95 Years**
.05	$18.26	$1.23 (7%)	$.32 (2%)
.07	$13.80	$.40(3%)	$.07 (0.5%)
.10	$9.92	$.08 (0.8%)	$.01 (0.1%)
.12	$8.30	$.03 (0.3%)	$.00 (.00%)

9. At a 10% rate of interest, the present value of the cash flows 51-75 years in the future is .08 cents—or about 0.8% of the value of the cash flow in the first 50 years (since .08/9.92=0.0081). The present value of the cash flows from 76-95 years is about 1 cent today— or one tenth of a percent of the value of the cash flow in the first 50 years.

Application to Copyright Extension

10. The above calculations show that the value of investment returns after 50 years in the future has a minuscule present value compared to the early returns. Hence the value of the cash flows during these later periods has a tiny effect on the present economic incentives to invest in creative works.

11. The above calculations are conservative in at least three respects. First, we have assumed a constant cash flow during the entire period under consideration. For most creative works, the earnings in the out years are much, much smaller than the earnings in the near years. Second, we have assumed that the cash flows will be delivered with certainty, even 50 years in the future. In reality, the cash flow associated with creative works

in the future is uncertain. It is plausible to assume that the risk increases the further into the future we look, so the expected present value of money delivered in the distant future is even smaller than indicated by the above calculations. Finally, even in the near years, the returns to creative works tends to be relatively risky; interest rates of 10-12% are on the low side for evaluating such risky investments.

Effect of Extending Copyright Term on Already-Created Works

12. Paragraphs 10 and 11 have examined the economic incentive to produce creative works. If the work is already created, then there is no incentive effect at all from lengthening the term of protection. When the work was created the author may have been concerned with the length of the copyright term since it affects the present value of the stream of returns from the author's investment in creating the work. However, once the work has been created, there are no incentive benefits from extending the term. No matter how long we extend the copyright term, we won't get any more works produced by Charles Dickens.

SIGNED UNDER THE PAINS AND PENALTIES THIS 20th DAY OF JULY, 1999.

Hal R. Varian

/s/

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, et al. Plaintiffs,	)	
v.	)	CA 99-0065 (JLG)
JANET RENO, in her official capacity as Attorney General of the United States Defendant.	)	

ORDER

Upon consideration of the parties cross-motions for Judgment on the Pleadings under Fed. R. Civ. P. 12(c), the responses and replies thereto, and for the reasons stated in the accompanying memorandum of law, it is by the Court this 27th day of October 1999,

ORDERED that the Plaintiffs' motion for Judgment on the Pleadings is DENIED; it is further

ORDERED that the Defendant's motion for Judgment on the Pleadings is GRANTED; and it is further

ORDERED that the Clerk shall mail copies of this Order to:

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/s/
JUNE L. GREEN
United States District Court Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERIC ELDRED, et al. Plaintiffs,	)	
v.	)	CA 99-0065 (JLG)
JANET RENO, in her official capacity as Attorney General of the United States Defendant.	)	

MEMORANDUM

Before the Court are the parties' cross-motions for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c), and the responses and replies thereto.[1] Pursuant to 28 U.S.C. § 2201 the Plaintiffs seek a declaratory judgment that Section 102(d) (1) (B) of the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 ("CTEA"), amending 17 U.S.C. § 304(b), is unconstitutional.[2]

For the reasons that follow, the Court concludes that the CTEA is not unconstitutional. Accordingly, the Court denies the declaratory judgment requested. As explained more fully below, the Defendant's motion for Judgment on the Pleadings is granted.

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[1] Amici Curiae filed briefs in support of the Defendant.

[2] They also seek, upon the courts finding that the CTEA is unconstitutional, a preliminary and permanent injunctive relief against the criminal enforcement of Section 2(b) of the No Electronic Theft Act of 1997, with respect to works that would not have a valid copyright but for the enactment of Section 102(d) (1) (B) of the CTEA. See Pub. L. No. 105-147, 111 Stat. 2678 ("NET Act"), amending 17 U.S.C. § 506(a). As the court denies the declaratory judgment, it also denies the injunctive relief requested.

I. BACKGROUND

The plaintiffs are Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus Co., American Film Heritage Association, Moviecraft, Inc., Dover publications, Inc., and Copyright's Commons. They allege that they each use, copy, reprint, perform, enhance, restore or sell works of art, film, or literature in the public domain. (Second Am. Compl. at 4.) They further allege that they prepared to use in some way works created before 1923 and but for the CTEA they could have legally copied, distributed, or performed these works that would otherwise have entered the public domain. (Second Am. Compl. at 4.)[3]

The Constitution provides that Congress has the power "[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries." U.S. Const. art. I, § 8, cl. 8. In 1790, pursuant to this power, Congress enacted a federal copyright statute providing for exclusive rights for limited times.[4] Since then, Congress revised and extended these exclusive rights for limited times.[5]

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[3] The Defendant does not deny these allegations or raise standing in any filing. (Ans. Second Am. Compl. at 2.) Unless the plaintiffs' allegation that they prepared to use these works in some way is untrue, the Plaintiffs have constitutional standing as the enactment of the CTEA allegedly caused an injury in fact to their ability to use these works that is redressable by declaratory judgment. See, e.g., Federal Election Commission v. Akins, 524 U.S. 11 (1998)

[4] The original statute provided a copyright for fourteen years and an additional fourteen years if the author was a living U.S. citizen. Act of May 31, 1790, §§ 1 and 3, 1 Stat. 124-125.

[5] See Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436; Act of March 4, 1909, oh. 320, § 23, 35 Stat. 1075, 1080; Act of Oct. 19, 1976, §8 302, 303; Pub. L. No. 94-553, 90 Stat. 2598; see also Pub. L. No. 87-668 (1962); Pub. L. No. 89-142 (1965); Pub. L. No. 90-141 (1967); Pub. L. No. 90416 (1968); Pub. L. No. 91-147 (1969); Pub. L. No. 91-555 (1970);

The latest revision and extension, the CTEA, became law on October 27, 1998. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827. The CTEA provides for exclusive rights for the life of the author plus 70 years (or for certain works, if the life of the author cannot be ascertained, for 95 years after publication or 120 years after the creation of the work, whichever is shorter). These rights apply to works created on or after January 1, 1978, and works created before then with existing rights subsisting in a renewal term provided by the Copyright Act of 1976.

Plaintiffs allege that the CTEA violates the first amendment. Pls.' Mem. at 35-58, 69-87. They also allege that the retrospective extension of copyright protection is beyond Congress's enumerated power under the copyright clause and violates the public [trust] doctrine. Pls.' Mem. at 23-35, 58-69.

II. Analysis

A. First Amendment Rights

The Plaintiffs' first claim, that the CTEA violates the First Amendment, is not supported by relevant case law. Pls.' Mem. at 35-58, 69-87. The District of Columbia Circuit has ruled definitively that there are no First Amendment rights to use the copyrighted works of others. United Video v. F.C.C., 890 F.2d 1173, 1191 (D.C. Cir. 1989); see Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985). Therefore, the Court rejects Plaintiffs' First Amendment claim.

B. Retrospective Extension

1. Enumerated Power

The Plaintiffs next allege that the retrospective extension of copyright protection is beyond Congress's enumerated power

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Pub. L. No. 92-170 (1971); Pub. L. No. 92-566 (1972); Pub. L. No. 93-573 (1974).

under the copyright clause. Pls.' Mem. at 23-35. They allege that the retrospective extension violates the "[l]imited [t]imes" and the "to [a]uthors" terms of the copyright clause. Pls.' Mem. at 23-28.

First, they allege that by changing, on several occasions, the limited times for some copyright grants, the Defendant violated the "[l]imited [t]imes" clause. Pls.' Mem. at 28-33. The Supreme Court has held that Congress defines the scope of the grant of copyrights to authors or to inventors under its copyright clause power.[6] Sony Corporation of America v. Universal City Studios, 464 U.S. 417, 429 (1984). The "[l]imited [t]imes" period is "subject to the discretion of Congress." Pennock & Sellers v. Dialogue, 27 U.S. (2 Pet.) 1, 16-17 (1829). Moreover, Congress has authority to enact retrospective laws under the copyright clause.[7] McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843). In light of these decisions, the Court concludes that the CTEA's extension of limited times is within the discretion of Congress.

Second, the Plaintiffs allege that the retrospective extension violates the "to [a]uthors" term of the copyright clause.[8] Pls.' Mem. [a]t 33-35. Under the CTEA, if, prior to its enactment, the author agreed in advance to assign rights under the CTEA's extended term, then such an agreement is given effect because there is no contrary presumption that the grant of extended term not be so assigned. 17 U.S.C. §§ 203, 304(c) and 304(d). Although the Plaintiffs allege that the absence of such a presumption violates the "to [a]uthors" term, it does not. The

[6] The introductory language of the copyright clause does not limit this power. Schnapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981).

[7] Within the discretion of Congress, any fixed term is a limited time because it is not perpetual. If a limited time is extended for a limited time then it remains a limited time.

[8] Congress has the power "[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries." U.S. Const. art. I, § 8, cl. 8.

author may agree to transfer his or her exclusive rights to a third party only for a limited period or, alternatively, subject to any applicable statutory termination right, the author may agree in advance (before a renewal period or term extension commences) to transfer or assign future copyrights conferred upon that author by Congress. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 773 (1943)

2. Public Trust Doctrine

Lastly, Plaintiffs allege that the retroactive extension of copyright protection violates the public trust doctrine. Pls.' Mem. at 58-59. Under the doctrine, the states hold title to navigable and tidal waters within their boundaries in trust for their people. See, e.g., Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473-81 (1988); District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1082-83 (D.C. Cir. 1984). Insofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine.

III. CONCLUSION

For the reasons set forth above, the Defendant's motion for Judgment on the Pleadings, pursuant to Fed. R. Civ. P. 12(c) is granted. An appropriate Order accompanies this Memorandum.

/s/
JUNE L. GREEN
United States District Court Judge

Dated: October 27, 1999

(14)

Supreme Court, U.S.
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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Did the D.C. Circuit err in holding that Congress has the power under the Copyright Clause to extend retroactively the term of existing copyrights?
2. Is a law that extends the term of existing and future copyrights "categorically immune from challenge[] under the First Amendment"?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit were petitioners Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviecraft, Inc., Dover Publications, Inc., and Copyright's Commons, and Janet Reno in her official capacity as Attorney General of the United States and her successor, John D. Ashcroft. None of these parties is either publicly held or affiliated with an entity that is so held. The Eagle Forum Education and Legal Defense Fund, L. Ray Patterson, Laura N. Gasaway, and Edward Walterscheid, as well as the Sherwood Anderson Literary Estate Trust, Sherwood Anderson Foundation, the American Society of Composers, Authors, and Publishers, AmSong, Inc., the Association of American Publishers, Inc., Broadcast Music, Inc., the Motion Picture Association of America, the National Music Publishers' Association, Inc., the Recording Industry Association of America, Inc., and the Songwriters Guild of America appeared as *amici curiae* in the Court of Appeals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 239 F.3d 372, and is reproduced in the appendix to the petition ("Pet. App.") at 1a. The order denying the petition for rehearing and for rehearing en banc (Pet. App. 24a) is reported at 255 F.3d 849 (2001). The memorandum opinion of the district court (Pet. App. 34a) is reported at 74 F. Supp. 2d 1 (1999).

JURISDICTION

The judgment of the Court of Appeals was issued on February 16, 2001. Petitioners filed a timely petition for rehearing or rehearing en banc, which the Court of Appeals denied on July 13, 2001. The petition for certiorari was filed on October 11, 2001. The Court granted the writ on February 19, 2002 and amended the grant on February 25, 2002. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Copyright and Patent Clause confers upon Congress the power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

U.S. CONST. art. I, § 8, cl. 8.

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.* amend. I.

The pertinent provisions of the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, Title I, 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 301-304), and the other copyright laws cited in this petition are reprinted in the appendix to the petition (Pet. App. 54a-67a) and the addendum to this brief.

STATEMENT OF THE CASE

This case is about the limits on Congress's Copyright Clause power, both internal to its enumeration in Article I, and under the constraints imposed by the Free Speech and Press Clause of the First Amendment.

1. The Constitution gives Congress the power to "promote the Progress of Science" by granting "exclusive Right[s]" to "Authors" for "limited Times." U.S. CONST. art. I, § 8, cl. 8. Congress now regularly escapes the restriction of "limited Times" by repeatedly extending the terms of existing copyrights—eleven times in the past forty years.[1] These blanket extensions were initially short (one or two years). In 1976, the extension was for nineteen years. Pub. L. No. 94-553, § 304(a), 90 Stat. 2573-74. In the statute at issue in this case, the Sonny Bono Copyright Term Extension Act (CTEA or Act), Pub. L. No. 105-298, Title I, 112 Stat. 2827, Congress has extended the term of existing and future copyrights by an additional twenty years. *Id.* § 102(b)&(d), 112 Stat. 2827-28 (amending 17 U.S.C. §§ 302, 304).

2. CTEA extends the duration of copyrights within the basic framework of the 1976 Act, which itself changed the system for calculating copyright duration. Before the 1976 Act, duration was a fixed term (28 years), renewable once. Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1080. The 1976 Act replaced the 1909 system with a dual system for calculating terms. Under this new system, the basic term for authors was the life of the author plus 50 years, but for works made for hire, and anonymous or pseudonymous works, the term was 75 years. Pub. L. No. 94-553, §§ 302-304, 90 Stat. 2572-76 (1976).

CTEA extends both types of terms, retroactively as well as prospectively. For any work published before January 1, 1978,

[1] *See* Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, Title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 94-553, § 304, 90 Stat. 2572 (1976); Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998); *see also* Pet. App. 42a-58a (reprinting statutes). This pattern is substantially different from the history of copyright during the Republic's first 150 years. In the first hundred years of federal copyright regulation, Congress extended the terms of copyrights once. Act of February 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439. In the next fifty years, Congress again extended the terms only once. Act of March 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1080-81.

and still under copyright on October 27, 1998, CTEA extends the copyright term to 95 years. Pub. L. No. 105-298, § 102(b)(1), 112 Stat. 2827. For work created on or after January 1, 1978, the term depends upon the nature of the "author." If the "author" is a natural and known person, then the term is extended to the life of the author plus 70 years. *Id.* § 102(b)(1)&(2), 112 Stat. 2827. If the author is a corporation (under the work made for hire doctrine), or is anonymous or pseudonymous, then the term is the shorter of 95 years from the year of first publication, or 120 years from creation. *Id.* § 102(b)(3), 112 Stat. 2827. *See generally* 17 U.S.C. § 302(a).

Thus, because of CTEA, works authored from 1923 on, which would initially have begun to fall into the public domain in 1998, will now remain under copyright until the end of 2018 at the earliest—a term of 95 years, unless extended again. Because of CTEA, future copyrights will now extend for the life of the author plus 70 years, or for works made for hire, 95 years, unless extended again. These terms contrast with the Framers' initial term of 14 years, renewable once if the author survived. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. As applied to an author who produced throughout a long lifetime in the pattern of Irving Berlin, the current rule would produce a term of 140 years.

3. Petitioners are various individuals and businesses that rely upon speech in the public domain for their creative work and livelihood. Most of the petitioners are commercial entities that build upon the public domain. Best known in this group is Dover Publications, a large-scale publisher of high-quality paperback books, including fiction and children's books. J.A. 18-19. Prior to CTEA, Dover had planned to republish a number of works from the 1920's and 1930's, including "The Prophet" by Kahlil Gibran and "The Harp-Weaver" by Edna St. Vincent Millay. J.A. 19. CTEA has delayed the entry of these works into the public domain by 20 years. *Id.*

Other petitioners engaged in commercial ventures face a similar constraint. Petitioners Luck's Music Library, Inc. and Edwin F. Kalmus & Co., Inc. specialize in selling and renting classical orchestral sheet music. J.A. 16-17. Both sell to thousands of customers worldwide, including many community

and scholastic orchestras. J.A. 16. Both had made preparations to release new sheet music for work that was to pass into the public domain in 1998. This included the work of Bela Bartok, Maurice J. Ravel, Richard Strauss. J.A. 16-17. Those plans have been blocked for 20 years.

Petitioners Higginson Book Company and Tri-Horn International publish historical works that draw upon the public domain. Higginson Book Company specializes in genealogy, historical maps, and local and county histories. J.A. 14. It reprints works that are in the public domain or with the permission of copyright holders. Because of the expense of tracing copyright ownership, Higginson must often wait until works pass into the public domain. *Id*; *see also* J.A. 14-15 (describing example). Tri-Horn sells products relating to the history and traditions of golf. J.A. 15. Because of the nature of this content, it is often difficult, if not impossible, to identify the copyright owner of this material. As a consequence, although prior to CTEA Tri-Horn expected to be able to release works based on golfers Bobby Jones and Walter Hagen, it has postponed its plans to do so. J.A. 15-16.

The American Film Heritage Association is a non-profit film preservation group. It represents documentary filmmakers and other commercial organizations who oppose copyright term extensions because of their significant adverse effects on film preservation. J.A. 17-18. Moviecraft, Inc. is a related commercial entity that depends upon old film for its business. J.A. 18. Much of this film is "orphaned" because current copyright holders cannot be identified, and all of it is now decaying because of the unstable properties of nitrate-based film and even so-called "safety" film. *Id.*; *see* Brief of *Amici* Hal Roach Studios & Michael Agee at 11-12 ["Agee Br."]. Moviecraft restores these old films when they pass into the public domain, but under CTEA no films will pass into the public domain for 20 years. J.A. 18.

Petitioners also include noncommercial individuals and entities that depend upon the public domain. Jill Crandall was a choir director at St. Gregory the Great Episcopal Church, in Athens, Georgia. J.A. 15. The high cost of sheet music for

copyrighted works forced her to select much of her music from work within the public domain. *Id.*; *see also* J.A. 16 (noting that Luck's Music sells some public domain works for half the amount charged for renting copyrighted pieces). Before CTEA, she had planned to perform work by Ralph Vaughan Williams and Edward Elgar. Under CTEA, these works will be unavailable for another generation. J.A. 15.

Lead petitioner, Eric Eldred, is a noncommercial publisher of existing works and a creator of new derivative ones.[2] In 1995, Eldred founded an Internet-based press, Eldritch Press. J.A. 12. Eldritch Press creates free versions of public domain works for the World Wide Web, as well as works for which he has obtained permission. These works are coded in the hypertext markup language (HTML) that underlies the Web. Eldred's press specializes in collections of Hawthorne, Oliver Wendell Holmes, Sr., and Henry James, among others. J.A. 12-14.

Eldred's creations are both copies and derivative works. J.A. 12-13. By using the technology of the Internet, he is able to build texts that are available freely around the world. By integrating search technologies and links, his texts enable students and scholars to study these works in ways that would be impossible with printed books. *Id.* In this sense, Eldred is building a library of public domain works, but with a technological capacity far exceeding that of the ordinary library.

Unlike a library, however, every part of an online collection is potentially regulated by copyright law. Because each posting of a work is technically a "copy," each posting is within the reach of the Copyright Act. In contrast, a library benefits from the "first sale doctrine," which assures that once a book is sold, that copy can be retransferred and even redistributed free of continuing

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[2] Other noncommercial activities affected by CTEA are described in the briefs of *amici*. *See, e.g.*, Brief of *Amici* Internet Archive *et al.* at 1 (libraries and internet archives) ["Internet Archive Br."]; Brief of *Amici* American Ass'n of Law Libraries *et al.* § III.A (historical and cultural preservation projects and scholarly research) ["AALL Br."]; Brief of *Amici* College Art Ass'n *et al.* at 3-16 (educational programs and materials, scholarly works, paintings, novels, art books, dramatic performances, anthologies, and historical publications).

control by the copyright owners. 17 U.S.C. § 109(a). Libraries can therefore build their collections free of ongoing regulation by copyright law. If the Derry New Hampshire Public Library, for example, wanted to build a special collection of the works of by Robert Frost, including his 1923 book of poems "New Hampshire," it could simply purchase copies of those works and make them available to the public. For Eldred to compile the same collection, he would have to secure the permission of the Frost estate. Eldred's need for a rich public domain is therefore greater than the need of an ordinary library.

The impact on the Internet of the copyright extensions being challenged here is the concern of many of the *amici* in this case. *Amicus* Brewster Kahle, for example, through his "Internet Archive," has stored copies of the entire Internet over the past 6 years. With Rick Prelinger, Kahle has also built an archive of public domain movies which will make film available in a digital form to viewers and filmmakers around the world. The technical capacity of this archive is limited only by the number of machines linked to the network. *See* Internet Archive Br. § II.C. But the regulatory constraints of copyright cannot be so easily overcome. The copyright owners of many of these films cannot even be identified. Their work thus cannot be made available on the Internet. Again, were Kahle and Prelinger to build the same archive off the Internet, their licensing costs would be much lower, but their ability to spread knowledge would be more restricted as well. A similar point is raised by *Amici* College Art Association *et al.* on pages 15-16 of their brief. The ability of educators, museum professionals, and librarians to educate depends upon the ability to use creative work. Extensions of copyright terms increase the cost of that education, and restrict the scope of knowledge these professionals can convey.

Petitioners have been harmed because of the delay that CTEA has inflicted on their ability to build upon and use content. Copyright law had, in effect, vested in these petitioners, as well as in the public, a remainderman interest in the works at stake. CTEA took that remainderman interest, and vested it in the current copyright holder. As a consequence, work that was

promised to pass into the public domain at the end of 1998 has now been withheld until 2019, with no assurance that in 2019 it will not be withheld again.

Some numbers will put this change in context. Between 1923 and 1942, there were approximately 3,350,000 copyright registrations. Approximately 425,000 (13%) of these were renewed.[3] The Congressional Research Service ("CRS") estimated that of these, only 18%, or approximately 77,000 copyrights, would constitute "surviving works"—works that continue to earn a royalty. The annual royalties for one segment of those surviving works, books, music, and film (which total 49,001 in the CRS study) will be, CRS estimates, approximately $317,000,000 (in 1997 dollars). Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 8, 12, 15, 16 (May 11, 1998). This means that in order to give the holders of less than 50,000 copyrights $317,000,000 in annual royalties, CTEA has blocked for two decades the entry into the public domain of more than 375,000 other works. Or put differently, because of CTEA, the public will *both* have to pay an additional $317 million annually in royalties for the approximately 50,000 surviving works, and be denied the benefits of those and 375,000 other creative works passing into the public domain in the first 20 years alone. (Today, the proportions would be far more significant, since there is no "renewal" requirement that moves over 85% of the works copyrighted into the public domain. Under current law, 3.35 million works would be blocked to protect 77,000.)

4. In January 1999, petitioners filed a facial challenge to CTEA, arguing that the retroactive aspect of CTEA exceeded Congress's power under the Copyright Clause, and that the ret-

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[3] U.S BUREAU OF THE CENSUS, STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 606 (1965); THE LIBRARY OF CONGRESS, 65 ANN. REP. OF THE REG. OF COPYRIGHTS 16 (1963); THE LIBRARY OF CONGRESS, 70 ANN. REP. OF THE REG. OF COPYRIGHTS 26 (1968); THE LIBRARY OF CONGRESS, 73 ANN. REP. OF THE REG. OF COPYRIGHTS 20 (1971).

roactive and prospective aspects of CTEA violated the Free Speech and Press Clauses of the First Amendment. J.A. 1, 4-26. Standing was based on the harm petitioners have suffered, and the threat of prosecution under the No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678. J.A. 7, 10. On a motion by the United States for judgment on the pleadings, the District Court dismissed the complaint. Pet. App. 34a-39a.

Petitioners appealed the Copyright Clause and First Amendment claims to the Court of Appeals for the D.C. Circuit. Over the dissent of Judge Sentelle, the court affirmed the District Court's judgment. Pet. App. 1a-23a.

The court rejected petitioners' First Amendment argument. While it held that petitioners had standing to raise a First Amendment challenge to both the prospective and retroactive aspects of CTEA, Pet. App. 4a-5a, the court held the substance of petitioners' claim barred by circuit precedent and this Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539 (1985). Pet. App. 5a-8a. According to the circuit court, this authority establishes that there is no "first amendment right to exploit the copyrighted works of others." Pet. App. 8a. By challenging a statute that extends the term of copyrights, the court concluded, petitioners were "by definition" asserting a First Amendment right to exploit the copyrighted works of others. Pet. App. 6a-8a. Indeed, according to the circuit court, "copyrights are categorically immune from challenges under the First Amendment." Pet. App. 6a.

The Court of Appeals also rejected petitioners' Copyright Clause claims. The court rejected petitioners' argument that the term "limited Times" should be read in light of the requirement that Congress "promote the Progress of Science." Pet. App. 10a-11a. The court held instead that this text does not restrict or even influence the scope of Congress's power at all. *Id.* Under the lower court's rule, an extension (or multiple extensions) of a "limited" term was permissible so long as each extension itself was limited. Pet. App. 10a-14a. The court also rejected petitioners' argument that CTEA violated the "originality" requirement of *Feist Publications v. Rural Telephone Service Co.,* 499 U.S. 340 (1991). Pet. App. 8a-10a.

Judge Sentelle dissented from the panel's decision with respect to the "limited Times" claim. Pet. App. 16a-23a. Following this Court's approach in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), he reasoned that a court must be able to discover the "outer limits" to a power granted Congress. Pet. App. 17a. To do that, Judge Sentelle asked whether "the rationale offered in support of [the extension of power] has any stopping point." *Id.* The answer was "no." The government had argued that any individual extension, no matter how repeatedly conferred, would be constitutional so long as each was for a fixed length. Pet. App. 18a-19a. That "rationale," Judge Sentelle reasoned, led to an "unlimited view of the copyright power"—just the same sort of "unlimited view" this Court had "rejected with reference to the Commerce Clause in *Lopez*." Pet. App. 17a.

Instead, Judge Sentelle maintained, the proper limit to Congress's power is found by "[r]eturning to the language of the clause itself"—in particular, its "grant of a power." Pet. App. 18a. Interpreting that language, Judge Sentelle wrote:

> [I]t is impossible that the Framers of the Constitution contemplated permanent protection, either directly obtained or attained through the guise of progressive extension of existing copyrights. . . . Extending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time.

Pet. App. 18a-19a.

5. Petitioners filed for rehearing and rehearing en banc. J.A. 3. The panel declined rehearing, and the D.C. Circuit denied rehearing en banc. Pet. App. 24a-27a. Judge Sentelle, joined by Judge Tatel, dissented from the denial of rehearing en banc. Pet. App. 28a-29a.

SUMMARY OF ARGUMENT

"The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

This case is about one important limit on the legislature's power that Congress has clearly "forgotten." The Copyright Clause gives Congress the power to "promote the Progress of Science," by granting "exclusive Right[s]" to "Authors" "*for*

limited Times." U.S. Const. art. I, § 8, cl. 8 (emphasis added). There is no mystery about what the Framers had in mind for the duration of copyright—they expected it would be "short" so that after a "short interval," creative work would pass into the public domain "without restraint." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 557, at 402-03 (reprinted with introduction by R. Rotunda & J. Nowak eds., 1987). Nor is there any doubting the Framers' fear about the power that they were creating: the resolution against monopolies was as strong in the framing generation as in any time since; they, more than we, were keenly sensitive to the dangers of state-backed monopolies.

But their hope was that the government might help spur learning and innovation. And to balance their hope against their fears, the Framers crafted the most carefully circumscribed power within Article I, § 8. The Copyright Clause is the only power in Article I that specifies both its ends—"to promote the Progress of Science"—and also its means—"by securing for limited times . . . exclusive Right[s]." Monopolies were to be allowed, but only to "promote [] Progress."

Congress has now found a way to evade this constitutional restraint. Rather than granting authors a fixed (i.e., "limited") term of copyright, Congress has repeatedly extended the terms of existing copyrights—eleven times in the past forty years. These extensions are for works that have already been created. They are not grants that require any new creation in return.

These repeated, blanket extensions of existing copyright terms exceed Congress's power under the Copyright Clause, both because they violate the "limited Times" requirement and because they violate this Court's "originality" requirement. They violate the "limited Times" requirement, first, because terms subject to repeated, blanket extensions are not "limited"; second, because a term granted to a work that already exists does not "promote the Progress of Science"; and third, because the grant of a longer term for already existing works violates the Copyright Clause's quid pro quo requirement—that monopoly rights be given *in exchange* for public benefit in return.

Retroactive extensions of the duration of existing copyrights also violate the Free Speech and Press Clauses of the First Amendment. The court below held that copyrights were "categorically immun[e]" from First Amendment scrutiny. That holding is erroneous. Copyright term extensions, like any content-neutral regulation of speech, must be subject to intermediate scrutiny. The government has offered, and could offer, no "important governmental interest" that could satisfy intermediate review. Moreover, even if the government could identify an important governmental interest, it has not (and could not) argue that CTEA was narrowly tailored to such an interest. This Court should therefore strike down the retroactive aspect of CTEA under the First Amendment as well. And because the retroactive aspect of CTEA is inseverable from its prospective aspect, CTEA's entire extension should be set aside.

This Court has never been called upon to interpret the meaning of "limited Times." It has assumed that this constitutional limit has been respected. As Justice Stevens wrote in *Sony Corp. v. Universal City Studios, Inc.*, because "copyright protection is not perpetual, the number of . . . works in the public domain *necessarily* increases each year." 464 U.S. 417, 443 n.23 (1984) (emphasis added). That "necessity" was certainly the Framers' design. It is not Congress's current practice.

ARGUMENT

I. THE COPYRIGHT TERM EXTENSION ACT'S BLANKET RETROACTIVE EXTENSION OF EXISTING COPYRIGHT TERMS EXCEEDS CONGRESS'S POWER UNDER THE COPYRIGHT CLAUSE

The opinion of the Court of Appeals suggests that alone among the enumerated powers, the Copyright Clause grants Congress effectively unbounded authority. Despite this Court's instruction in *United States v. Lopez*, 514 U.S. 549 (1995), *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *United States v. Morrison*, 529 U.S. 598 (2000), that "[t]he powers of the legislature are defined and lim-

ited," and that these limits are "not solely a matter of legislative grace," *Morrison*, 529 U.S. at 616, the Court of Appeals ruled that the most distinctive feature of the Copyright Clause—its grant of power "[t]o promote the Progress of Science"—"constitutes [no] limit on congressional power.'" Pet. App. 10a (quotation omitted). Thus freed from the Constitution's actual text, the Court of Appeals adopted a reading of the term "limited Times" that permits Congress to evade the Framers' clear intent that copyright terms be fixed, and that after a "short interval," creative works pass into the public domain "without restraint." STORY, *supra*, at 402.

This failure to interpret and apply the limits of the Copyright Clause is error enough in light of this Court's longstanding practice interpreting that Clause. No other clause in Article I, § 8 has a longer history of substantive constraints on Congress's power recognized by this Court. *See Wheaton v. Peters*, 33 U.S. 591 (1834) (rejecting common law copyright); *Trade-Mark Cases*, 100 U.S. 82 (1879) (holding trademark law unsupported by Copyright Clause power); *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (clause "both a grant of power and a limitation"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (rejecting state law adding patent-like protection); *Feist Publ'ns v. Rural Tel. Ser. Co.*, 499 U.S. 499 U.S. 340, 346 (1991) ("originality" a constitutional requirement).

But especially in light of this Court's clear instruction that enumerated powers are "subject to outer limits," *Lopez*, 514 U.S. at 556-57, and that those limits must be judicially determined, *see Boerne*, 521 U.S. at 557, the refusal to give *any* meaning to the Constitution's plain text ("to promote the Progress of Science") is error. As the Court wrote in *Morrison*, citing *Marbury*, it is so "that . . . limits may not be mistaken or *forgotten* [that] the constitution is written." *Morrison*, 529 U.S. at 607 (citation omitted) (emphasis added). By ignoring the Constitution's text, the Court of Appeals has allowed the Framers' limits to be ignored.

The limits of the Copyright Clause, like the limits of the Commerce Clause, are both express and "inherent in [the] text and constitutional context." *Morrison*, 529 U.S. at 619. As

Judge Sentelle argued in dissent below, to determine their scope, a court must identify a "stopping point" to the enumerated power. Pet. App. 17a (Sentelle, J., dissenting). If the government cannot articulate a practical stopping point to the expansion of Congress's power, then its understanding of that enumerated power is incomplete. *Id.*

In this case, the government could identify no such "stopping point." So long as each extension of copyright terms was itself fixed, the government argued that the constitutional requirement was met. That reading, Judge Sentelle rightly found, renders the constitutional restriction meaningless. "[T]here is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection." Pet. App. 18a. Indeed, as is demonstrated below (*see infra* pp. 23-28), the government's interpretation creates precisely the destructive incentives that the Framers were trying to avoid. Thus under the principle of enumeration, a different interpretation of "limited Times" is required—one that forbids retroactive extensions of existing terms.

In *Lopez* and *Morrison*, the principle of enumeration supported values of federalism. But there could be no principled reason why federalist limits should be judicially enforced while copyright's limits should not. If anything, the reasons favoring the application of a principle of enumeration to the Copyright Clause are more compelling than its application in the context of federalism. The textual limits are more certain; copyright values intersect with First Amendment liberties; and the political interests are not subject to self-regulation through competition between sovereigns. These reasons explain this Court's long history enforcing the limits of the Copyright and Patent Clause. They reinforce Judge Sentelle's conclusion that the principle of enumeration applies to the Copyright Clause as it does to other limits on federal power.

Petitioners do not argue that there is no room for congressional discretion in setting authors' creative incentives through copyright law. *See, e.g., Pennock v. Dialogue*, 27 U.S. 1, 16-17 (1829) ("this exclusive right shall exist but for a limited period, and that the period shall be subject to the discretion of con-

gress."). But it is "*within the limits* of the constitutional grant [that] Congress may . . . implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Graham*, 383 U.S. at 6 (emphasis added). There is no discretion over whether the grant has any limits at all.

Nor do petitioners argue, as the Court of Appeals implied, that "50 years are enough to 'promote . . . Progress,' . . . [but] a grant of 70 years is unconstitutional." Pet. App. 10a. Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court. But whether extensions for works already created prevent copyrights from being for "limited Times," and exceeds a power to "promote the Progress of Science," *is* a judgment that this Court can appropriately make. The line between *prospective* and *retroactive* extensions is a clear one. If "limited Times" is to have any meaningful content, it is a line this Court must draw.

A. Text and Structure of the Copyright Clause

Petitioners' argument depends fundamentally upon the text, structure and original meaning of the Copyright Clause. The Copyright Clause gives Congress the power:

> [a] To promote the Progress of Science and useful Arts [b] by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

U.S. CONST. art. I, § 8, cl. 8. (brackets added). To help clarify its meaning, petitioners refer to [a] as the *progress* part of the Copyright Clause, and [b] as the *rights* part. (As the "useful Arts" is understood to refer to the patent authority, EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 18 (2002), petitioners refer to the "Progress of Science" only.)

In the context of the framing, the aim of this clause was nothing new. Its structure, however, was distinct. England had passed the Statute of Anne 80 years before; its ideal to "promote learning" was familiar in state legislation of the time. Brief of *Amici* Tyler T. Ochoa *et al.* at 5-6, 11-13 ["Historians' Br."]. That the Constitution would grant Congress the power to

"promote learning" was not surprising. The only genuine question was how.

The answer was a clause that is unique within Article I. The Copyright Clause is the only clause in Article I that "describes both the objective which Congress may seek and the means to achieve it." *Goldstein v. California*, 412 U.S. 546, 555 (1973). That "objective" is identified in the *progress* part of the clause—"to promote the Progress of Science." *Feist,* 499 U.S. at 349 ("primary objective"); *Pennock v. Dialogue*, 27 U.S. at 19 ("main object"). The "means" are enumerated in the *rights* part—"by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." The two parts together grant Congress the power *to* do X *by* means of Y—*to* promote the Progress of Science *by* exchanging time-limited copyrights to authors for their writings.

1. "*To promote . . . Progress*": The words of the *progress* half of the Copyright Clause have been defined by this Court consistently with the Framers' understanding. "To promote," this Court has said, means "'to stimulate,' 'to encourage,' or 'to induce.'" *Goldstein*, 412 U.S. at 555. "[T]he Progress of Science" means "artistic creativity," *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), "the creative activity of authors," *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 546 (1985) (citing *Sony*, 464 U.S. at 429), "the creative effort," *id.* at 450, "the creation of useful works," *id.* at 558, or simply "creation," *Feist,* 499 U.S. at 347.[4] The aim was

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[4] At the time of the framing, the term "science" did not have our contemporary meaning. Instead, "science" meant "knowledge" or "learning." WALTERSCHEID, NATURE, *supra*, at 125. In contrast, "Progress" did have a sense that is still familiar today. As Samuel Johnson defined the term, "progress" meant "advancement; motion forward" as in this passage from Locke: "The bounds of all body we have no difficulty to arrive at; but when the mind is there, it finds nothing to hinder its progress into the endless expansion," or alternatively, "intellectual improvement; advancement in knowledge." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (W. Strahan 1755). The latter definition is closest to the framing purpose. Webster's definition is not far from Johnson's: "[t]he action or progress of advancing or improving by marked stages or degrees; gradual betterment; as, assured of his progress; the history of educational progress;

to induce the production of something "new to the world," *Pennock*, 27 U.S. at 20, using a state-granted monopoly "to bring forth new knowledge." *Graham*, 383 U.S. at 8-9.

2. *"By securing for limited Times . . . exclusive Right[s]"*: The technique of the *rights* part of the Copyright Clause was also familiar to the Framers. In exchange for an "exclusive Right" limited in duration, the "Author[]" must produce a "Writing[]." U.S. Const. art. I., § 8, cl. 8. The mechanism is a quid pro quo. *Pennock*, 27 U.S. at 23 (rejecting patent for work released to the public because there "would be no quid pro quo"); *see also Brenner v. Manson*, 383 U.S. 519, 534 (1966) (describing the "basic quid pro quo"). Congress may give authors rights *in exchange for* writings. The clause gives Congress the power to secure a bargain—this for that.[5]

These two parts of the Copyright Clause were plainly meant to function together. The means specified in the *rights* part ("by securing for limited Times . . . exclusive Right") were set against the ends specified in the *progress* part ("to promote the

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specifically progressive development or evolution of mankind, as a process or fact." WEBSTER'S NEW INT'L DICTIONARY 1977 (2d ed. 1950) (4th entry).

[5] This language of "exchange" is uniform throughout the history of the Copyright Clause. The monopoly granted is "the equivalent given by the public for benefits bestowed," *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-28 (1932); it is to "repay[]" the author for what otherwise "would not . . . have existed." *Butcher's Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter House Co.*, 111 U.S. 746, 763 (1884). As Judge Learned Hand described it, the "monopoly [is] in exchange for a dedication" to the public, *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 89 (2d Cir. 1940), which this Court held the "States may not render fruitless" by adding new restrictions to the ones that Congress has set. *Bonito*, 489 U.S. at 152. The grant is made upon the "condition" that the work will pass into the public domain upon the copyright's "expiration." *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 185 (1896). The author "impliedly agrees" to this "condition," *id.* at 191-92, as the grant is, as James Madison wrote, "a compensation for a benefit actually gained to the community as a purchase of property." James Madison, *Aspects of Monopoly One Hundred Years Ago*, 128 HARPER'S MONTHLY MAGAZINE 490 (1914). *See generally* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1162-64.

Progress of Science"), so that the limited purpose for which monopolies could be granted would be clear, and not *"forgotten."* *Marbury v. Madison*, 5 U.S. at 176 (emphasis added). Just as the Necessary and Proper Clause is constrained by the enumerated powers, such that the only power granted by that clause is the power to promote "proper" legislative ends,[6] so too is the *rights* half of the Copyright Clause ("by securing for limited Times . . . exclusive Right") constrained by its enumerated end ("to promote the Progress of Science"). Indeed, the structure of Article I, § 8, cl. 8 mirrors the overall structure of Article I, § 8—the *rights* part of the Copyright Clause stands to the *progress* part as the Necessary and Proper Clause stands to the other enumerated powers.

3. *"Limited Times"*: The duration of the copyright grant was to be "limited." In the framing context, the meaning of "limited" was as plain as it is today. A term is limited if it is "appointed, fixed," "narrow," or "circumscribed." WEBSTER'S NEW INT'L DICTIONARY 1434 (2d ed. 1950); *see also* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (W. Strahan 1755) (defining "to limit": "to confine within certain bounds; to restrain; to circumscribe; not to leave at large"). In the drafting of the Copyright Clause, Charles Pinckney of South Carolina first proposed the term "a certain time." "Certain" was struck, and "limited" was put in its place. *See* III DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 556 (Dep't of State 1900) (Convention, Aug. 18, 1787). "Certain" suggests a fixed, knowable period; "limited" suggests not just that the period be fixed, but that it also be short in duration. STORY, *supra*, at 402 ("a short interval").

B. CTEA's Retroactive Aspect Violates the "Limited Times" Requirement of the Copyright Clause

This Court has never decided whether Congress has the power, consistent with the "limited Times" requirement, to ex-

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[6] *See Printz v. United States*, 521 U.S. 898, 924 (1997) (citing Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297-33 (1993)).

tend the terms of existing copyrights. It is undisputed that, as the government concedes, and both the majority and dissent agreed below, Congress has no power under the Copyright Clause to grant permanent monopolies. Pet. App. 10a. Thus, the sole issue is whether Congress may achieve indirectly what it cannot achieve directly—a perpetual term "on the installment plan." *The Copyright Term Extension Act of 1995: Hearings on S. 483 before the Senate Judiciary Comm.*, 104th Cong. 73 (1995) (statement of Jaszi) [1995 Senate Hearings].

This Court should hold that it cannot. A blanket extension of existing copyright terms violates the "limited Times" requirement because it is (a) not a "limited Time[]," (b) not a "limited Time[]" that "promotes the Progress of Science," and (c) not compatible with the quid pro quo requirement of the Copyright Clause. These three requirements are all confirmed by the history of the framing context. CTEA fails all three.

1. Retroactively Extended Copyright Terms Are Not "Limited"

As described above, the Constitution requires that the duration of a copyright term be "limited." Under the recent practice of Congress—extending the terms of existing copyrights eleven times in the past forty years—copyright terms are no longer "limited." This practice shows that, rather than fixed, or certain, or "limited," terms are perpetually changeable and expandable. Under the reasoning of the Court of Appeals, so long as each extension is for a fixed length, Congress is free to extend copyright terms ad infinitum. Pet. App. 10a-14a.

The consequence is that no author or artist can rely upon work passing into the public domain. *See* Agee Br. at 10 (describing reliance interests). An author who wants to release a counter-story to a famous novel cannot know when (or whether) that novel will pass into the public domain. *See, e.g., Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (suit to enjoin publication of THE WIND DONE GONE). A director who wants to adapt a play in a manner inconsistent with the original author's wish can never know when the author's rights will end. *See* Dinitia Smith, *Immortal Words, Immortal Royalties?*, N.Y. TIMES, Mar. 28, 1998, at B7

(noting that Gershwin's "Porgy and Bess" is only licensed for a Black cast). It is by permitting retroactive extensions that this uncertainty is created, and this uncertainty defeats the Framers' purpose in protecting the public domain. It shows that terms are not "limited."

The government concedes that some limit is necessary. It argued below that "[i]t may well be that some term extensions are so long . . . that a court could conclude that Congress has in effect created an unlimited term." Appellee's Br. 17. But how long is too long? Is 75 years for software "in effect . . . an unlimited term"? As in *Morrison* and *Lopez*, the government promises a limit, but offers no way to find it. On the government's test, "[t]he Congress that can extend the protection of an existing work from 100 years to 120 years, can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300." Pet. App. 18a. (Sentelle, J., dissenting).[7]

The uncertainty in this standardless test, and the uncertainty about whether copyright terms expire, means that by any reasonable standard copyright terms are not "limited." On this basis alone, this Court should conclude CTEA exceeds Congress's power, stating a clear and certain test that retroactive extensions are not permitted.

2. Retroactively Extended Copyright Terms Do Not "Promote the Progress of Science"

Because the "limited Times" requirement "stands connected" to the power "to promote the Progress of Science," *Wheaton*, 33 U.S. at 661, its meaning must be determined in light of that specified end. *Id.* The Court of Appeals declined to do this. It expressly "rejected the argument 'that the introduc-

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[7] There are, to be sure, always line-drawing problems. But it was in part in response to them that the Court in *Lopez* and *Morrison* emphasized also a categorical limit to Congress's power under the Commerce Clause: in *Lopez* the Court emphasized that the law had "nothing to do with the regulation of commercial activity," 514 U.S. at 577, and in *Morrison* that "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. Similarly here, the retroactive extension in the Act violates the Constitution not only as a matter of degree, but also of kind. It crosses the line of any plausible limit.

tory language of the Copyright Clause constitutes a limit on congressional power.'" Pet. App. 10a.

The conclusion of the Court of Appeals is plainly erroneous. This Court has consistently interpreted the scope of Congress's Copyright Clause power in light of the requirement that Congress "promote the Progress of Science." Indeed, there is no way to make sense of this Court's most significant Copyright Clause cases, *except* in terms of the language and inherent restrictions of the *progress* part of the Copyright Clause.

In *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), for example, this Court unanimously confirmed that the copyright power may only be deployed to protect work that is "original." "Originality is a constitutional requirement," *id.* at 346, "the sine qua non of copyright." *Id.* at 345. Because of this requirement, Congress is not permitted to grant copyright protection to the mere statement of "facts," or to works within the "public domain." *Id.* at 350.

Yet the term "original" does not appear in the text of the Copyright Clause. Nor is this restriction explained by reference to the words "Authors" or "Writings" alone. *Cf. Trade-Mark Cases, supra* (explaining restriction). As this Court defined the term, "[o]riginal . . . means only that the work was independently created by the author (as opposed to copied from other works), *and that it possesses at least some minimal degree of creativity.*" *Feist,* 499 U.S. at 345 (emphasis added). While the requirement that the work be "independently created by the author" might derive from the requirement that copyright be granted to "Authors" for "*their* Writings" (emphasis added), the additional requirement that it "possess[] at least some minimal degree of creativity" necessarily depends upon the concept of "progress" set forth in the first half of the Copyright Clause. For example, abstracted from the clause as a whole (as the Court of Appeals read the term "limited Times"), there would be no violence done to the word "Author" by referring to the compiler of a book of discount and interest rate tables as an "author." Nor would there be error in calling that book a "writing." But a book of discount and interest rate tables is not an "original" work under *Feist*, because a report of "facts" is not the "creation" of the facts reported. Tyler T. Ochoa, *Patent*

and Copyright Term Extensions and the Constitution: A Historical Perspective, 49 J. COPYR. SOC'Y USA 19, 47, 51 (2002) (describing example and *Feist*). *Feist's* requirement of "some minimal degree of creativity" can only be explained in light of the requirement that copyrights "promote the Progress of Science." *Accord* WALTERSCHEID, NATURE, *supra*, at 396-97.

The same conclusion follows from this Court's repeated insistence that Congress may not use its power under the Copyright Clause to "remove existent knowledge from the public domain." *Bonito*, 489 U.S. at 146, citing *Graham*, 383 U.S. at 6 (patents); *Feist,* 499 U.S. at 350 (copyrights). There is no "public domain" clause in the Copyright Clause, and absent the requirement that patents "promote the Progress of . . . useful Arts," there is no textual reason why Congress today could not grant a patent to an "Inventor" for his "Discover[y]" just because that discovery has already passed into the public domain. There would be no misuse of the terms "Inventor" and "Discoveries," for example, if Congress today restored a patent to Thomas Edison (and hence his heirs) for his 1923 patent relating to disk phonograph record production (patent no. 1,546,573), which entered the public domain over half-a-century ago. Yet as this Court has held, in light of the "limitations" built into the clause, "monopolies" are not permitted under the Copyright Clause when there is no "concomitant *advance* in the 'Progress of Science and useful Arts.'" *Bonito*, 489 U.S. at 146 (emphasis added). Instead, as the Court has instructed, "*[t]his is the standard expressed in the Constitution,*" "*and it may not be ignored.*" *Graham,* 383 U.S. at 6 (emphasis added).

These restrictions on Congress's power make sense only in light of the requirement that Congress "promote the Progress of Science." They are consistent with a long line of authority that reads the power of Congress under the *rights* part of the Copyright Clause in light of the ends identified in the *progress*

part.[8] They manifest a consistent method for interpreting Congress's power to grant monopoly *rights* under a power to promote *progress*. That same method should apply to the term "limited Times."

So interpreted, a term would be a "limited Time[]" if it "stimulate[s]," *Goldstein*, 412 U.S. at 555, "the creative activity of authors," *Sony*, 464 U.S. at 429. It follows that a blanket extension of existing copyrights cannot be a "limited Time[]" that "promote[s] the Progress of Science." It cannot, because the incentive is being given for work that has already been produced. Retroactive extensions cannot "promote" the past. No matter what we offer Hawthorne or Hemingway or Gershwin, they will not produce anything more. Retroactive extension might promote harmonization—CTEA does not (*see infra* pp. 43-44) but a hypothetical statute could. It might increase the reward to heirs of long-dead authors. It might even induce some to restore decaying films—though again, petitioners deny that CTEA does so, and deny that that alone is a sufficient interest. *See infra* pp. 44-45. These alternative ends might well be actual or legitimate. But they are *not* the ends specified in the *progress* half of the Copyright Clause. *Whatever else* a

[8] *See Pennock v. Dialogue*, 27 U.S. at 19 (Story, J.) (patent would "materially retard the progress of science and the useful arts"); *Kendall v. Winsor*, 62 U.S. 322, 328 (1858) (same); *Clayton v. Stone*, 5 F. Cas. 999, 1003 (C.C.S.D. N.Y. 1829) (No. 2,872) (Thompson, J.) ("object [of statute] was the promotion of science"); *Baker v. Selden*, 101 U.S. 99, 105 (1879) (relying on *Clayton*); *Higgins v. Keufel*, 140 U.S. 428, 430 (1891) (act read in light of purpose); *Sony Corp.*, 464 U.S. at 477 (rejecting copyrights "in which strict enforcement . . . would inhibit the very 'Progress of Science and Useful Arts' that copyright is intended to promote"); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts . . . '"); *see also Frantz Mfg. Co. v. Phenix Mfg. Co.*, 457 F.2d 314, 327 n.48 (7th Cir. 1972) ("The congressional power . . . is likewise limited to that which accomplishes the stated purpose of promoting 'the Progress of Science and useful Arts'") (Stevens, J.); ARTHUR W. WEIL, AMERICAN COPYRIGHT LAW 31 (1917) ("Copyright acts must be passed for the promotion of the progress of science . . . [and] for this purpose only").

monopoly protection under that clause may do, it must promote "creative activity" to satisfy the limits of the Constitution. *Sony*, 464 U.S. at 429.

3. Retroactively Extended Copyright Terms Violate the Quid Pro Quo Requirement of the Copyright Clause

The text and structure of the *rights* part of the Copyright Clause ("by securing for limited Times to Authors . . . exclusive Right") imbeds a quid pro quo. Congress may make a trade—it may grant an "exclusive Right" for a "limited Time[]" *in exchange for* a "Writing" by an "Author." It may not handout a monopoly over speech in exchange for nothing—*quid pro nihilo*. This was the Framers' clear understanding, confirmed by this Court in its cases interpreting Congress's Copyright Clause power. *See supra* p. 16 & n.5.

The retroactive aspect of CTEA violates this requirement of exchange. Whatever material benefit might flow to the author or his heirs or publisher from the extension of this exclusive right, Congress has not conditioned that grant upon a gain by the public. The grant is thus a windfall, not an incentive. Rather than "a compensation for a benefit actually gained to the community as a purchase of property," Madison, *Aspects of Monopoly*, *supra*, at 490, CTEA is simply a boon to the heirs of copyright holders. It thus violates the core of the quid pro quo built into the Copyright Clause.

Congress certainly has the power to grant such windfalls through tax benefits, or outright gifts. But its Copyright Clause power is contingent upon an exchange. As nothing is received by the public in exchange for, or conditioned upon, the retroactive extension, CTEA is beyond Congress's power.

4. The Historical Context Confirms that a Blanket, Retroactive Extension Exceeds Congress's Power

The Framers had a purpose in crafting the Copyright Clause as carefully, and uniquely, as they did. Petitioners' interpretation of "limited Times" makes sense of that purpose. The Court of Appeals' interpretation does not. Indeed, the interpretation

of the court below *exacerbates* the very problem that the Framers were trying to avoid.

The Framers drafted the Copyright Clause against the background of English experience with monopolies in general, and with publishing monopolies in particular. Their clear aim was to avoid the "corruption" experienced with both. Royal abuse of the Crown's prerogative to grant monopoly had been a major cause of the English Civil War. *See, e.g.,* CHRISTINE MACLEOD, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660-1800, at 16 (1988). By the time of the framing, England had restrained the excesses of the Crown's monopolistic practices generally, and weakened the monopolistic control the London publishers held on learning. Both experiences meant that the Framers "were not about to give the Congress any general power to create monopolies," WALTERSCHEID, NATURE, *supra*, at 95, nor any specific power to grant monopolies (such as the Copyright and Patent Clause) unless carefully limited.

Of particular concern was the Crown's practice of granting monopolies for objects or items of trade that were already in existence. As this Court has explained, the clause "was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public." *Graham,* 383 U.S. at 5; *see also* George Ramsey, *The Historical Background of Patents*, 18 J. PAT. OFF. SOC'Y 6, 7 (1936) ("during [Elizabeth's] Reign patents were granted that were monopolistic in character and covered most of the necessities of life"). King Henry VIII issued a printer's patent for the Bible. Roger Syn, *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 4 (2001). King James I issued a patent for the "sole right of making certain writs in the Court of Common Pleas," as well as for clay pipes, printing ballads and playbills, gold and silver thread, and most famously, playing cards. Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 SW. U. L. REV. 1, 65-66 (2000). Such an unre-

strained monopoly power in America, the Framers believed, would simply create the incentive for the same kind of corruption. Henry H. Permit, Jr., *Electronic Freedom of Information Act*, 50 ADMIN. L. REV. 391, 410 n.131 (1998) ("Some of the revolutionary fervor both for the English revolution and the American one more than a century later came from reaction to perceived corruption associated with the grant of [monopolies]").

The practice of granting monopolies to industries already in existence had an obvious, and deleterious, effect not only on consumer welfare, but on incentives to innovate. "The very possibility of securing exclusive privileges was an invitation to those at court to join in the race for favors." WILLIAM HYDE PRICE, THE ENGLISH PATENTS OF MONOPOLY 16 (1906). That race was not for "new inventions." *Id.* New inventions were "left for poor and often chimerical inventors." *Id.* Instead, the powerful competed for "monopolies in old industries." *Id.*; *see also* Paul S. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1143; DAVID DEAN, LAW-MAKING AND SOCIETY IN LATE ELIZABETHAN ENGLAND: THE PARLIAMENT OF ENGLAND, 1584-1601, at 163-64 (1996). This in turn produced what the Framers referred to as "the spirit of monopoly"—the tendency to look to government for favors and protection in industry rather than to compete with new innovations and creativity. Hall & Sellers, THE PENNSYLVANIA GAZETTE, Feb. 16, 1785, Item No. 71221.

Today, the conduct that the Framers sought to prevent would be called "rent-seeking"—economically inefficient attempts by some private parties to gain advantage through invocations of the political process.[9] The Framers employed a different vocabulary,

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[9] James Buchanan explains the concept and its historical roots:

> Suppose that, instead of discovering a new commodity or service or production process, an innovating entrepreneur discovers a way to convince the government that he "deserves" to be granted a monopoly right, and the government will enforce such a right by keeping out all potential entrants. No value is created in the process; indeed, the monopolization involves a net destruction of value. The rents secured re-

but similarly recognized that governmental grants of exclusive rights for already existing creations served no social end, but merely induced private parties to dissipate "effort, time and other productive resources" in currying lawmakers' favor. TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 8 (James Buchanan, Robert Tollson & Gordon Tullock, eds., 1980).

This danger was a particular concern for the Framers in the context of copyright. Until the Statute of Anne (1710), copyright in England had been perpetual. Historians' Br. at 5-6. After the Statute of Anne limited the copyright term, publishers continued to insist that their common law copyright remained perpetual, the Statute of Anne notwithstanding. Not until 1774 was this question finally resolved against the publishers. *Donaldson v. Beckett*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774). But by that time, publishers had achieved a strong control over the publication of new works, fueled by their monopolistic control over the publication of old works. The Framers feared that publishers in America would achieve the same power over learning that they held in England. Marci Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 659 (1996). They therefore crafted the Copyright Clause so as to "prevent the formation of oppressive monopolies." *Aiken*, 422 U.S. at 164.

Their technique was familiar—a "mechanism[] [for] decentralizing and controlling power." Marci Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS INTELL. PROP. FROM BENJAMIN N. CARDOZO SCH. L., YESHIVA U. 6 (1999). Just as the Framers had responded to fear about federal power (federalism), and to fear about the power of the church (the Establishment Clause), "[t]he Framers' solution [to the fear about concentrated power in publishers] was to divide power, to demarcate its limits, and

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flect a diversion of value from consumers generally to the favored rent seeker, with a net loss of value in the process.
TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 7 (James Buchanan, Robert Tollson & Gordon Tullock, eds., 1980).

to establish mechanisms that would guard against [its] aggrandizement." *Id.* Thus, unlike the Statute of Anne, the Copyright Clause gave Congress the power to vest copyrights in "Author[s]," not "booksellers." 8 Anne, ch. 19, § 1 (1710). The "English experience," Professor Patterson has written, "caused the framers . . . to exclude publishers from the copyright clause." L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 32-33 (1987). The Copyright Clause is thus not so much "pro-author but rather anti-publisher."[10] Hamilton, *Historical and Philosophical Underpinnings, supra*, at 8. By securing copyrights to "Authors" who individually would never control the market generally, and by securing those rights for just "limited Times," the Framers established a mechanism to staunch the concentration of power over speech in the hands of a historically suspect few.

Against the background of these concerns over corruption, and over the concentration of power in the hands of publishers,[11] this Court should apply a meaning of "limited Times" that would achieve the Framers' purpose. The Copyright Clause would achieve that end if read to prohibit an indefinite and endless power to extend existing terms.

The interpretation by the court below does not achieve this end. Contrary to the Framers' intent, under the reading of the Court of Appeals, "publishers" retain a perpetual incentive to lobby Congress to extend existing terms. The incentives to de-

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[10] Milton had a view of those publishers that was shared generally: "old patentees and monopolizers in the trade of bookselling, men who do not labour in an honest profession to learning is indetted." PHILIP WITTENBERG, THE PROTECTION OF LITERARY PROPERTY 31 (1968) (citing JOHN MILTON, AREOPAGITICA & OF EDUCATION 43 (Kathleen Lea ed., 1973)); *see also* L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 178-79 (1968).

[11] These concerns are not simply historical. As the Wall Street Journal wrote, the clear effect of "leaving [CTEA] intact will [be to] do nothing more than create an ever-growing cartel of ownership of intellectual property that will stifle the continuing growth and spread of ideas." *Unfair Use*, WALL ST. J., Feb. 21, 2002, at A16.

centralize control over speech intended by the Framers are thus erased.[12]

There is no reason that "limited Times" needs to be read to defeat the Framers' plain purpose. A plain meaning of the term, in light of the structure of the clause, and consistent with the history of its interpretation, yields a result that would achieve the Framers' ends. An interpretation of "limited Times" banning blanket retroactive extensions of the duration can eliminate (a) the incentive to lobby for extended terms, (b) the tendency to concentration, and (c) an excessive reliance by those publishers on works from the past to the exclusion of the new.

5. The Copyright Act of 1790 Gives No Support to Congress's Retroactive Extension of Copyright Terms

The Court of Appeals suggested that, because the First Congress in its first copyright act granted copyrights to works "already printed," it itself "extended the terms of existing copyrights," Pet. App. 13a-14a, and so must have considered permissible extensions such as the one challenged here. This argument is plainly mistaken.

The Copyright Act of 1790 did not extend the terms of existing copyrights. As this Court "has repeatedly said, [the 1790 Act] did not sanction an existing right, but created a new one." *Fox*, 286 U.S. at 127; *see also Mazer v. Stein*, 347 U.S. 201, 214-15 (1954); *Wheaton*, 33 U.S. at 661. The federal copyright was the replacement for whatever rights—state statutory copyrights, or common law copyrights—might have existed prior to the 1790 statute.

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[12] Indeed, between the interpretation of "limited Times" proposed by the Court of Appeals and a perpetual term, a perpetual term would better avoid the incentives to corruption that were at least part of the Framers' concern. At least with a perpetual term, there would be no need repeatedly to direct resources towards Congress to secure a continuing monopoly right as there had been in England to secure monopoly favor. *See* ROBERT B. EKELUND & ROBERT D. TOLLISON, MERCANTILISM AS A RENT-SEEKING SOCIETY: ECONOMIC REGULATION IN HISTORICAL PERSPECTIVE 18 (1981).

The need for this replacement was obvious to the first Congress, in light of the general and continued confusion about whether there was a common law copyright, and in light of the states' decision (at the request of the Continental Congress) to create state law copyrights. U.S. COPYRIGHT OFFICE, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT, BULLETIN NO. 3, at 1-21 (rev. ed. 1963); L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 183 (1968). Although this Court in 1834 concluded in the *Wheaton* case that there was no common law copyright that protected an author after a work was published, *see supra* p. 12, it is clear from the mix of state statutes granting state law copyrights, as well as from the variously expressed views of different Framers and contemporaneous legal authority, that at the time the Constitution was enacted, the matter was at least uncertain. Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 19 HAMLINE L. REV. 81, 87 (1995); WALTERSCHEID, NATURE, *supra,* at 76; *see also* 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 477 (1953) ("the Common Law of the United States . . . was in a highly uncertain state on the subject of copyrights"). Rawle believed there were common law copyrights in the United States as late as 1825. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 102 (1825). And Congress in its first major revision of copyright law in 1831 treated copyright as a creature of natural law—mistakenly, as *Wheaton* would show. 7 GALES AND SEATON'S REGISTER OF DEBATES IN CONGRESS 424 (21st Cong., 2d Sess. 1831) ("merely the legal provision for a protection of a natural right").

In light of this uncertainty, the first Congress was fully justified in granting authors and proprietors of "already printed" works a federal copyright to replace any common law or state granted copyright the work might possess. The Framers' aim was to terminate any conflicting state or common law claims. CROSSKEY, *supra,* at 477. The federal grant can thus be understood as a *compensation* for the expected displacement of a

state-protected right. *Accord* WALTERSCHEID, NATURE, *supra,* at 436-38.

It is therefore simply incorrect to infer from the 1790 Act that the Framers envisioned a general exception to the rule that "exclusive Rights" were to "promote [] progress." The statute of 1790 stands for nothing more than the need of the First Congress to address fundamental issues of transition from a state federation to a national government. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 (1995) (citing Justice Story's account of conceptual problems of a transition to a federal government). That they chose this relatively uncumbersome method (as opposed to the formal surrender of a right in the context of patents, *see* Act of February 21, 1793, ch. 11, § 7, 1 Stat. 322) does not demonstrate a general principle permitting the blanket extension of the term of existing copyrights.

To be sure, a rule against retroactive copyright extensions would cast into doubt the 1831 and 1909 Acts, and possibly the 1976 Act. All three can be distinguished from CTEA.[13] As petitioners have argued, the 1831 statute was the product of what this Court determined in 1834 to be a mistaken understanding of the nature of the copyright power. *See supra* p. 29. The 1909 and 1976 statutes simply followed the examples that preceded them. Never during this time was any court asked to rule on the

[13] The 1831 Act extended, both prospectively and retrospectively, the initial term from 14 to 28 years (and left the renewal term at 14 years). Act of Feb. 3, 1831, § 2, 16. In order for a new work to receive a copyright, however, the Act imposed several requirements, including depositing a copy of the work with the federal government for recording and paying a fee. *Id.* § 4. Similar prerequisites were imposed under the predecessor statute, the Act of 1790, Act of May 31, 1790, § 3, as amended by Act of April 29, 1802, ch. 36, 2 Stat. 171, which would have applied to the copyrights whose terms the 1831 Act retroactively extended. Similarly, the 1909 Act extended the renewal term to 28 years for both existing and future copyrights. Act of March 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1080-81. This extension did not automatically benefit every eligible author, however. In order to obtain a renewal term of 28 years, an author (or his heirs) had to properly file an application for renewal in the Copyright Office. *Id.* These requirements had the salutary effect of keeping registrations of existing and protected work. No comparable requirements exist under CTEA or current copyright law.

constitutionality of the retroactive extensions under the "limited Times" clause. Neither can the extension in 1831 be attributed to the Framers (no Framer sat in Congress in 1831), nor can two extensions in 150 years be held to be a constitutionally ratified practice. *Cf. Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) (deference for "[t]he construction placed upon the constitution by the first act of *1790* and the act of *1802*, by the men *who were contemporary with its formation*") (emphasis added). Whether or not two extensions in 150 years are excusable, the eleventh in forty years must be held to have crossed the line.

6. If Retroactive Extensions Are Not Per Se Invalid, They Must at a Minimum Be Tested for "Congruence and Proportionality" to the Ends of the Copyright Clause

Petitioners advance a *per se* rule banning blanket retroactive extensions of copyright terms. Just as the "originality requirement" bans all grants of copyright to works that are not "original," this rule would ban blanket retroactive extensions of copyright terms as not being terms that are "limited." Such a rule would provide clarity and certainty for both copyright holders and those building upon the public domain.

Even if this Court does not adopt this rule, however, Congress must not be left to define on its own the limits the Constitution sets. At a minimum, this Court should adopt a rule of heightened review, requiring that any extensions be "congruent and proportional" to proper Copyright Clause ends. This Court recognized a similar standard in *City of Boerne* where it wrote that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" for legislation passed pursuant to § 5 of the 14th Amendment to pass constitutional review. 521 U.S. at 508. The same structure can guide the Court in enforcing the limits of the Copyright Clause.

Like the power to enforce the 14th Amendment in § 5, the power to "secure for limited Times to Authors . . . exclusive Right[s]" is a *means* to a constitutionally specified *end*—to "promote the Progress of Science." Like § 5, the power to "se-

cure for limited Times" also contains language in the "affirmative grant of congressional power [that] also serves to limit that power." *Kimel*, 528 U.S. at 81. Accordingly, as with § 5, this Court should ensure that Congress does not exceed its power to "secure for limited Times" by granting "exclusive Right[s]" where there is no proportional Copyright Clause benefit.

The need for some form of heightened review is particularly clear in this case. The Court of Appeals offered just one justification for the retroactive extension of existing copyrights—that it would create incentives to restore old films. Pet. App. 13a. Petitioners would contest the factual premise of the court's judgment. *See infra* pp. 44-45. As *Amicus* Agee argues, it is the extension of copyright terms that create the transaction costs making restoration impossible. Agee Br. at 10-17. But even if the court below were correct, the notion that the need to restore old films could justify an across-the-board extension to all existing copyrights in all media is simply astounding. Just to encourage the preservation of film, a full generation of creative work is denied to another generation of creators.

Therefore, in the alternative, this Court should reverse and remand for consideration by the court below whether the extension of the existing terms challenged here can be shown to be "congruent and proportional" to Congress's legitimate Copyright Clause ends. *See* AALL Br. § III. The government should bear the burden of such a showing, and the court below should reject it if the extension is significantly broader than is necessary to achieve the government's legitimate end. *Cf. Turner Broad. Sys. v. FCC*, 520 U.S. 180, 182 (1997) (speech burden must be "congruent to the benefits") (*Turner II*).

C. The Retroactive Aspect of CTEA Violates the "Originality" Requirement of *Feist*

Independent of CTEA's violation of the "limited Times" provision in the Copyright Clause, its retroactive extension of existing terms violates the "originality" requirement of *Feist*. *Feist* requires that copyrights be granted to works that are "original." While existing works with copyrights affected by CTEA were presumptively original when copyright protection first attached, this Court's precedent shows that the constitutional requirement of "originality" continues beyond that initial vesting. If "the sine qua non of copyright is originality," *Feist*, 449 U.S. at 345, then whenever Congress extends to an "Author" an "exclusive Right," that grant too must be tested for originality.

The authority for this claim is *Feist* itself. *Feist* characterized material "in the public domain" as "not original." *Id.* at 350; *see also Harper*, 471 U.S. at 548 ("copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are *not original*—for example . . . *materials in the public domain*") (emphasis added). But obviously, material in the public domain was, at one point, original. Nathaniel Hawthorne's *The Scarlet Letter* (1850) is in the public domain. If a new copyright could not be granted to it now because it is no longer "original," that is not because it failed to satisfy the requirements of "originality" when written. It must instead be because the requirements of "originality" restrict subsequent grants.

This Court expressed that same understanding in the *Trade-Mark Cases*. In concluding that trademark legislation could not be upheld under the Copyright Clause power, this Court reasoned that trademarks were often granted for expression "already in existence." *Trade-Mark Cases*, 100 U.S. at 94. That fact, the Court held, put trademarks beyond the scope of the "Authors" and "Writings" intended to be covered by the Copyright Clause. Even though some of these marks were plainly, at one point at least, "Writings" by some "Author," the Court found they were not sufficiently "original" to merit a new grant of statutory protection.

The same reasoning should apply to retroactive extensions of existing copyright terms. Such extensions are granted for works that are "already in existence." *Id.* at 94. Like works in the public domain, these works may once have been "original"; but like works in the public domain, they are "original" no longer. Thus, under the reasoning of *Feist* and the *Trade-Mark Cases*, the retroactive aspect of CTEA is beyond Congress's power for this reason as well.

II. CTEA'S BLANKET RETROACTIVE AND PROSPECTIVE EXTENSIONS OF COPYRIGHT TERMS ARE NOT IMMUNE FROM FIRST AMENDMENT SCRUTINY

Even if Congress were found to have authority under the Copyright Clause to extend copyright terms without regard to their effect upon the "Progress of Science," CTEA violates the Free Speech and Press Clauses of the First Amendment. Under ordinary principles of First Amendment review, the restrictions on speech effected by both extensions greatly outweigh any plausible free speech benefit. The Court of Appeals held otherwise only by declining to apply any First Amendment scrutiny at all to the challenged extensions. Stating that Congress's mere decision to place works under copyright, regardless of the strength or weakness of its justification, "obviates further inquiry under the First Amendment," Pet. App. 7a, the court below announced the novel rule that "copyrights are categorically immune from challenges under the First Amendment." Pet. App. 6a. That ruling was in error.

A. *Harper & Row* Does Not Exempt Copyright Statutes from First Amendment Review

In categorically dismissing petitioners' free speech claims, the court below erroneously relied upon this Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), treating *Harper & Row* as an "insuperable bar[]" to a First Amendment challenge to any copyright statute. Pet. App. 5a. *Harper & Row*, however, is no such thing.

In *Harper & Row*, this Court declined to craft "a public figure exception to copyright" that would have expanded beyond recognition the exception already recognized for fair use. 471 U.S. at 560. Harper & Row had an exclusive right to President Gerald Ford's autobiography. The Nation Magazine "scooped" part of that autobiography without Harper & Row's consent. In defending against an infringement action, The Nation argued that because President Ford was a "public figure," and his pardon of President Nixon was of significant public import, free speech values should trump Harper & Row's copyright interests, forcing an exception to the enforcement of an otherwise valid and pre-existing copyright.

The Nation Magazine did not argue that Harper & Row's copyright was invalid, that the law granting Harper & Row's copyright was unconstitutional, or that copyright law could not properly extend to works about public figures. Instead, it simply asserted that it had a First Amendment right to trespass on Harper & Row's exclusive right.

This Court properly rejected The Nation's argument. By creating an incentive to produce speech that otherwise would not be produced, the Court explained, copyright functions as an "engine of free expression." 471 U.S. at 558. If a work lost that protection simply because it became important, or because it was about a public figure, that would destroy much of the speech-inducing effect that copyright law produced. *Id.* This would defeat the purpose of copyright protection. Thus, so long as copyright law protects expression rather than "facts or ideas," and so long as it preserves space for "fair use," this Court found "no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright." *Id.* at 560.

This Court's refusal to carve out a public figure exception to the scope of copyright in *Harper & Row*, however, plainly did not establish a general First Amendment immunity for all copyright statutes. At most, the case established a presumption against the need to engage in a First Amendment analysis every time a *copyright owner* seeks to enforce his copyright against an infringer. *Id.* But nothing in *Harper & Row* suggests that *Congress* could evade First Amendment review should it amend the copyright statute to eliminate the idea/expression distinction or to constrict the scope of fair use. Nor would *Harper & Row* immunize from First Amendment review a copyright act that was content-based simply because it reached expression only. (If France, for example, adopted a statute banning copyright for "hate speech," and Congress sought to "harmonize" with that rule, *Harper & Row* would not preclude First Amendment review.) *Harper & Row* simply applied the First Amendment to the existing exceptions for ideas and fair

use, and found them sufficient to satisfy the requirements of the Free Speech and Press Clauses on the merits. Nothing in *Harper & Row* obviated the need for First Amendment inquiry into whether a copyright law has permissibly struck the balance between copyright and free speech at the outset.

The First Amendment interests raised by copyright's duration are in any event distinct from the First Amendment interests raised by the scope of protection enjoyed during the term of a copyright. *Harper & Row* held that copyright law is justified by substantial content-neutral interests that make copyright "an engine of free expression," 471 U.S. at 558, *so long as* it creates a market in authors' expression and does not give an author a property right in his ideas, *see id.* at 560; *id.* at 582 (Brennan, J., dissenting), and *so long as* the "fair use" exception limits the scope of a copyright owner's control over his expression. *Id.* at 560.

The idea/expression and fair use limitations, however, are irrelevant to the First Amendment interests protected by limitations on the duration of copyright. The whole point of the Framers' directive that terms be "limited" was that copyrighted works would pass into a public domain where they would "admit the people at large . . . to the full possession and enjoyment of all writings and inventions without restraint." STORY, *supra,* at 402-03. The constitutional interest in the public domain is an interest in guaranteeing access not just to the author's ideas but also his expression. The idea/expression distinction cited in *Harper & Row* and relied on by the court below by definition cannot protect this interest.

Likewise with the limitations of "fair use." As this Court explained,

> [A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such *noncommercial* uses would merely inhibit access to ideas without any countervailing benefit.

Sony, 464 U.S. at 450-51 (emphasis added). By contrast, a limitation of the duration of copyright enables both commercial and non-commercial actors to vindicate First Amendment interests in drawing upon the creator's work. The purpose of the public domain—the default state that copyright is temporarily permitted to alter—is to free material for any kind of use. As "fair use" does not extend the benefit of use to commercial and non-commercial actors alike, it is insufficient to vindicate the Framers' objective in limiting copyright terms.

In sum, *Harper & Row* does not bar First Amendment scrutiny of extensions of copyright terms. To the contrary, the injury to vital First Amendment interests caused by elongating copyrights should be reviewed under the very same standard that *Harper & Row* announced and applied: that copyright law may be upheld against First Amendment challenge insofar—but only insofar—as it protects an "engine of free expression," *Harper & Row,* 471 U.S. at 558, and it should be invalidated if its restrictions "merely inhibit access to ideas without any countervailing benefit." *Sony*, 464 U.S. at 450-51. The decision of the court below to bypass the First Amendment entirely was therefore plain error.

B. CTEA Is a Content-Neutral Regulation of Speech Subject to Intermediate Scrutiny under the Standard of *Turner*

By barring the unauthorized use or dissemination of copyrighted works, copyright law regulates speech. To be sure, copyright law is content-neutral speech regulation, for its sole purpose is to provide an economic incentive for authors to produce "original" work, without regard to the content of the material protected, the viewpoint of the author, or the subject matter of the speech. *See, e.g., CBS Broad., Inc. v. EchoStar Communications Corp.,* 265 F.3d 1193, 1211 (11th Cir. 2001) (copyright law is content-neutral speech regulation), *petition for cert. filed*, 70 U.S.L.W. 3626 (Mar. 28, 2002) (No. 01-1450); *Satellite Broad. & Communications Ass'n v. FCC*, 275 F.3d 337, 355 (4th Cir. 2001) (same), *petition for cert. filed*, 70 U.S.L.W. 3580 (Mar. 7, 2002) (No. 01-1332); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 450-51 (2d Cir. 2001) (same); *see also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 47-54

(2001). But there can be no dispute that copyright law prevents willing speakers who would adapt or distribute copyrighted works from reaching willing audiences. It is regulation "in derogation of common right," as Jefferson's attorney general, Levi Lincoln, said of patents. Levi Lincoln, *Patents for Inventions, 26 May 1802*, *reprinted in* 3 THE FOUNDERS' CONSTITUTION 41 (P. Kurland & R. Lerner eds., 1987). It is therefore speech regulation.

The significance of this speech regulation has only increased over time. The scope of the monopoly that the government confers under the copyright laws has expanded dramatically over the nation's history, and with it the severity of copyright's interference with freedom of speech. The "exclusive Right" of which the Framers spoke was little more than an unfair competition law, directed exclusively against publishers, reaching only the right to "publish, republish, and vend" a particular writing, and lasting for just 14 years, renewable once. Act of May 31, 1790, § 1, 1 Stat. 124. In the two centuries since, Congress has expanded this "exclusive Right" to cover "copying" as well as publishing, to regulate derivative as well as original works, and to last often for more than a century. The consequence is that authors now may bar translations, abridgments, dramatizations, performances, and other uses of copyrighted works that the Framers left unregulated. *See* 17 U.S.C. § 106; Netanel, *supra*, at 16-17. And now, because of the emergence of the Internet (and the technological fact that every interaction in the context of the Internet makes a "copy" of something), copyright law will increasingly control ordinary uses of creative content in activities that before the Internet were not even remotely within the reach of copyright. *See, e.g.*, L. Ray Patterson & Judge Stanley F. Birch, *Copyright and Free Speech Rights*, 4 J. INTELL. PROP. L. 1, 3 (1996) ("New technology provides new means [to] enable[] the copyright owner to control access"); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, *supra*, at 48 ("copyright owner's right to control access to the work far exceeds what could have been imagined in 1841").

These changes are not necessarily improper. But they must be tested against unchanging principles—that speech regulations go no further than is necessary to achieve important governmental interests. Accordingly, like any other form of content-neutral regulation that tries to balance free speech interests "on both sides of the equation," *Turner II*, 520 U.S. at 227 (Breyer, J., concurring), CTEA should be subject to intermediate scrutiny under the First Amendment. Like cable regulation (which restricts the free speech rights of cable operators in order to balance speech rights of viewers, *see Turner II, supra*), or privacy regulation (which "directly interfere[s] with free expression . . . [in order] to protect . . . an interest . . . 'in fostering private speech,'" *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring)), copyright regulation restricts the reach of the public domain in order to fuel an "engine of free expression" by authors. But like all regulation that allocates the right to speak among speakers, copyright regulation too must be justified under intermediate review. *Cf. Turner Broadcasting v. FCC*, 512 U.S. 622, 675-76 (1994) (describing speaker-based regulation subject to intermediate scrutiny) (*Turner I*).

C. CTEA's Retroactive Extension of Copyright Does Not Satisfy Intermediate Scrutiny

CTEA can withstand First Amendment review only "[1] if it advances important governmental interests unrelated to the suppression of free speech and [2] does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189; *see also United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to time, place, and manner regulation of speech in the public forum); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 (1987) (applying *O'Brien* review to a law protecting the word "Olympic" under trademark law).

In *Turner*, this Court suggested that the "important governmental interests" advanced to sustain such regulation must have been Congress's at the time it legislated. As the Court wrote, a reviewing court must "assure that, in formulating its

judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner I*, 512 U.S. at 666; *Turner II*, 520 U.S. at 195. But whether this Court limits itself to what Congress considered, or considers anew any interest the government could have advanced, CTEA cannot sustain the burden of intermediate review. The "mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation" from First Amendment review, 512 U.S. at 640, and Congress engaged in little more than "assertion" in this case.

Indeed, as we now show, the legislative record falls so far short of *Turner*'s requirements that this Court may review CTEA under the *Turner* standard and deem it invalid on its face without remand.[14]

1. CTEA Fails to Advance an "Important Governmental Interest"

In the court below, the government did not advance any interest in retroactive copyright extension that it claimed would satisfy intermediate scrutiny. Nor could it, for the only content-neutral interest that this Court has recognized as sustaining copyright's speech restrictions—namely, providing incentives to authors to create original works, *Harper*, 471 U.S. at 558—is irrelevant once a work has been created. *See* Pet. App. 32a-33a; Brief of *Amici* Akerlof *et al.* at 3-9 ["Economists' Br."] The other reasons the government might advance for CTEA's

[14] Because the prospective extension of copyrights in CTEA is inseverable from the retroactive, *see infra* § III, the prospective extension stands or falls under the First Amendment with the strength of the justification for the retroactive extension. Alternatively, this Court should strike the retroactive extension and remand for an evidentiary hearing under the *Turner* standard on the prospective extension.

Because the court of appeals found CTEA immune from First Amendment scrutiny, it did not conduct the *Turner* balancing. Accordingly, our petition sought only a remand on the First Amendment claims. However, in its opposition, the Government broadened the second question to include the merits of the First Amendment claim, and therefore we believe that the Court may consider it. As Part III of this brief demonstrates, a remand is necessary to consider the non-severability of the prospective CTEA extension from the retroactive extension.

retroactive extension of the duration of copyright are all either illegitimate, insignificant, or hypothesized after the fact in violation of *Turner*'s actual purpose requirement. None is substantial enough to outweigh the free speech burden upon those who have long relied on the expectation that the "limited Times" requirement would assure that works would enter the table domain.

a. *Income to heirs*: The government argued below that Congress's desire to secure a longer economic return to aged living authors and dead authors' heirs is a sufficient justification for the retroactive extension of terms under rational basis scrutiny. *See* Appellee's Br. at 22-28. But windfall benefits for the economic well-being of authors and their heirs *independent of any claimed incentive to create* cannot constitute a legitimate, much less an important or substantial, governmental interest sufficient to justify a restriction of speech. Whatever their permissibility elsewhere in the legislative lexicon, naked wealth transfers between speakers are forbidden by the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

By retroactively extending copyright terms, Congress is directly re-allocating the right to speak. It is choosing favored speakers (including rightly-beloved speakers, such as Disney, or the estate of Robert Frost) and disfavoring other speakers who would, but for this regulation, be permitted to develop derivative works, or perform free of the restrictions of copyright. Such speech restrictions for the benefit of some speakers at the expense of other speakers and listeners, if unrelated to the incentive to create, are no more sanctioned by the First Amendment than a tax on CNN to benefit C-SPAN. *Cf. Turner I*, 512 U.S. at 676 (O'Connor, J., dissenting) (noting that a "preference for broadcasters over cable programmers" that was "justified with reference to content" rather than market incentives would be subject to strict scrutiny under the First Amendment).

b. *Speech promotion*: The only justification this Court has ever recognized for restricting speech in order to benefit

authors has been the incentives that restriction produces to create more speech. *See* Rebecca Tushnet, *Copyright as a Model for Free Speech Law*, 42 B.C. L. REV. 1, 35-67 (2000); Netanel, *supra*, at 26-30. Such an incentive to create could qualify as an "important governmental interest" *if* Congress could reasonably have believed that the restriction it imposed through CTEA's retroactive copyright extensions actually advanced the incentive to create. But no such plausible inference is possible when the extension is granted long after the moment of creation or in many cases after the author's own death.

The government argued below that a windfall to the heirs of creators, and to companies that hold copyrights, might inspire them to produce new, creative work that they otherwise would not have created. *See* Appellee's Br. at 37. Were this true, it might well constitute an "important governmental interest." But Congress had before it no evidence whatever that creators' heirs or corporate holders of copyrights are more likely to make creative use of earlier work than those who, like petitioners, have eagerly awaited that work's entry into the public domain. Neither is there any such evidence. Nor is there any logical reason to conclude that such windfalls would increase creativity. When copyright is offered as a quid pro quo, the conferral provides an important incentive. But when an extension is granted without a quid pro quo, there is no change in incentives to produce. Economists' Br. at 8-10; ROBERT L. BARD & LEWIS KURLANTZICK, COPYRIGHT DURATION 59-63, 81-84 (1999). The extension is a windfall, pure and simple, not an "engine of free expression." There is no more reason to believe the heirs of Gershwin will use this windfall to produce new work than that they will use it to fund a longer vacation. As Congressman Hoke stated, in support of CTEA, "I think it's a sham to try to hang on the theory that we're creating incentives." *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intell. Prop. of the House Comm. on the Judiciary*, 104th Cong., 420 (1995) (Statement of Rep. Hoke) [1995 House Hearings].

c. *Harmonization with international regimes*: The government has also argued that harmonization with European copyright terms provides a rational basis for the retroactive extension of terms. With respect to existing works, however, the only effects that harmonization might possibly have are (1) reducing the transaction costs for commercial use of copyrighted work, or (2) increasing income to authors and their heirs. The second interest is insufficient for the reasons already given. The first interest is not one that CTEA plausibly advances, and even if it did, it would be insufficiently substantial to satisfy intermediate review.

The government has yet to demonstrate any meaningful sense in which CTEA "harmonized" copyright terms. Nor could it, for CTEA in fact does no such thing. As the Register of Copyrights, Marybeth Peters testified, the bill "does not completely harmonize our law with the [EU directive]. In some cases, the U.S. term would be longer; in others the EU terms would be." 1995 House Hearings, *supra*, at 197. Scholars agreed that CTEA would achieve no harmonization between American and global property regimes. *Id.* 305 (statement of Professor Karjala); 349 (statement of Professor Patry); 382-87 (statement of Professor Reichman); *see also* Copyright Law Professors Br. at 16-20; BARD & KURLANTZICK, *supra*, 191-93, 198-200 nn. 276-77. Indeed, as many noted, CTEA actually *increases* the disharmony between American and EU law. *See, e.g.*, -1995 House Hearings, *supra*, at 372 (statement of Prof. Reichman) (noting that CTEA would "unilaterally worsen the existing disparities").

The fantasy of alleged "harmonization" is apparent from even a cursory review of the statute. The only categories of work that CTEA harmonized are works by non-corporate authors after 1978. Every other category of published copyrighted work has either not been harmonized, or has had its dissonance increased. *See* Dennis J. Karjala, *Harmonization Chart*, http://makeashorterlink.com/?R2FB432E (mapping out difference between U.S. and EU law) (reprinted in Addendum at 15a-19a). Six out of twenty categories of copyright are actually *less* harmonized now than they were prior to CTEA. *Id.* In

no meaningful sense, then, can CTEA be said to harmonize terms.

Even with respect to the work of non-corporate authors after 1978, however, the government has yet to show how the change from life plus 50 to life plus 70 increased harmonization from a global perspective. There are 76 countries today with a life plus 50 regime but only 26 with life plus 70. *See* National Copyright Legislation, http://www.unesco.org/culture/copy. CTEA, thus, moved the United States from the dominant world standard to a minority one. The copyright term within the United States is therefore actually less harmonized with foreign copyright terms today than before CTEA and in important categories even less harmonized with EU policy.

But even assuming CTEA did actually harmonize terms, the only possible benefit from harmonization *itself* is a reduction in the transaction costs of copyright licensing. Congress made no showing—nor could it—that the transaction costs in calculating terms were interfering with the creation of copyrighted work. But even if it could, merely increasing administrative convenience has never been deemed a sufficiently substantial governmental interest to satisfy intermediate review. As this Court has held in parallel contexts, the reduction of administrative burdens is not an "important governmental interest" that could satisfy any standard more demanding than mere rationality review. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (holding "any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience," violates equal protection). Nor should such an interest, even if found credible, be found substantial here.

d. *Preservation of existing works*: Finally, the government has argued, and the Court of Appeals found below, that CTEA's retroactive extension of copyright would provide an incentive "to preserve older works, particularly motion pictures in need of restoration." Pet. App. 12a.

Were there any substantial evidence in the legislative record to support the belief that longer terms would increase the incentives of holders of "older works" to restore them, this might

well be an "important governmental interest." (It would not, however, constitute a Copyright Clause interest if the restored work were not "original." *Feist, supra.*). But as *Amici* College Art Association *et al.* demonstrate, there was absolutely no credible evidence presented to Congress upon which this Court could rely to conclude that CTEA would spur restoration. *See* College Art Ass'n Br. at 19-20. Indeed, as *Amici* Agee exhaustively demonstrates, extended terms *reduce* the likelihood that films will be restored. More often than not, the most significant barrier to restoring and distributing old films is the legal barrier caused by old and untraceable copyrights. *See* Agee Br. at 14-17. The large number of "orphaned" films described by the Librarian of Congress testifies to the costs of extended terms. Report of the Librarian of Congress, *Film Preservation 1993: A Study of the Current State of American Film Preservation* 5-10 (1993). These are films that cannot be restored and distributed by the copyright owners because the owners cannot be identified. Increased terms only increase this cost. *See* AALL Br. at 21-25; Agee Br. at 15-17; College Art Ass'n Br. at 5-10. There is no way, on the legislative record actually compiled, that this Court could conclude that Congress found to the contrary on the basis of substantial evidence.

2. CTEA Burdens Substantially More Speech than Necessary

Even if the government could demonstrate that CTEA advanced an important governmental interest in speech promotion or preservation, the law burdens far more speech than necessary to achieve such interests. While a content-neutral "regulation need not be the least speech-restrictive means of advancing the Government's interests," *Turner I*, 512 U.S. at 662, the requirement of intermediate scrutiny is not satisfied when a "substantial portion of the burden on speech does not serve to advance" the important governmental interest. *Id.* at 682 (O'Connor, dissenting). "That some speech within a broad category causes harm . . . does not justify restricting the whole category." *Id.*

The example relied upon by the Court of Appeals—the supposed incentive to film preservation—is the clearest case of such

excessive overbreadth. Based on the figures provided by the Congressional Research Service, it can be estimated that approximately 19,000 films under copyright from 1923-42 have been affected by CTEA. Of these, 5,000 would continue to earn royalties and survive to expiration. Rappaport, *supra*, at 15. If the interest advanced by the government is that films that would not have been restored will now be restored because of CTEA, then it could only be a portion of the remaining 14,000 films.

Yet even if CTEA produced enough incentive to restore all of these films, there is no reason for CTEA to reach beyond these films to *all copyrighted material*, including books, magazine articles, works of art, music and musical recordings, plays, and other artistic creations bearing no relation whatever to the physical properties of decaying celluloid film. More than 400,000 works are affected by the extension of CTEA in its first 20 years. *See supra* p. 7. The preservation of even 15,000 films could not possibly justify the exclusion of willing speakers and listeners from use of more than 400,000 other creative works. Congress may not "burn the house to roast the pig." *Butler v. Michigan,* 352 U.S. 380, 383 (1957). A restriction of all existing copyrights just to save a relatively tiny number of films restricts "substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

In any event, Congress could easily have achieved the same alleged pro-speech benefit by conditioning the extension of copyright upon the copyright holder's restoration of the endangered work. By granting an extension that is unconditional, Congress not only provides a weak incentive for copyright holders to restore these old works, but also creates a legal thicket ensuring that no one else can restore these works either. As the Librarian of Congress testified, the vast majority of old, early films needing preservation have copyrights that are held by unknown entities. *Redefining Film Preservation: A National Plan; Recommendations of the Librarian of Congress in Consultation with the National Film Preservation Board* 25 (1994). These "orphaned works" cannot be released because the copyrights cannot be cleared. Here the law serves no function ex-

cept to block access to creative works. A more narrowly tailored restriction could have avoided this harm.

The same problem with extreme overbreadth affects each of the other alleged governmental interests that might be asserted in CTEA's defense. If international harmonization is an important governmental interest, then it would only justify extensions that actually harmonized terms, or harmonization for foreign works only, or harmonized prospectively. CTEA's extensions do not. If the incentive to heirs of authors or holders of copyright were an important governmental interest, then Congress could have conditioned the grant upon new creativity. There was no need to grant a windfall rather than the traditional quid pro quo. And finally, if income to heirs of authors were a legitimate, much less an important, governmental interest, then Congress could have adopted the proposal of the Congressional Research Service to make any extension contingent upon the payment of a user fee. Then only owners of copyrights in works generating an estimated income exceeding the user fee would pay the fee. Rappaport, *supra*, at 17-20. The balance of the copyrighted works would have passed into the public domain.

On the legislative record actually compiled in Congress, it is impossible to conclude that Congress could rationally have found CTEA's blanket retroactive copyright term extension narrowly tailored to increasing speech or any other important governmental interest. This Court should therefore find the retroactive aspect of CTEA unconstitutional, and strike down its prospective aspect as inseverable (see Part III below).

3. At a Minimum, the First Amendment Requires Reversal and Remand for Development of an Evidentiary Record

If this Court cannot conclude on the record before it whether CTEA survives intermediate scrutiny under the First Amendment, then it should remand this case to the District Court to hold a *Turner* hearing to consider the evidence. While petitioners have requested intermediate scrutiny throughout this litigation, neither the District Court nor the Court of Appeals conducted any First Amendment review whatever. As a consequence, if this Court believes that CTEA might be justified by some argument not yet

advanced or fully articulated by the government, it should reverse the judgment below and remand with instructions that any such proffered justifications be subjected to intermediate scrutiny as set forth in *Turner*.

III. CTEA'S PROSPECTIVE AND RETROACTIVE EXTENSIONS OF COPYRIGHT TERMS ARE INSEVERABLE

If this Court agrees with petitioners that CTEA is unconstitutional in its retroactive extension of existing copyrights, then it must decide how the court below should proceed on remand. While this question is not expressly within the scope of the questions presented, petitioners are bound to advise this Court that under its precedents, the retroactive aspect of CTEA cannot be severed from the prospective aspect. As petitioners argued below, *see* Pl. Summ. J. Mem. at 87-89, § 102 of CTEA must therefore be struck in its entirety.

As this Court has recognized, the standard for severability is "well established: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (citing *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam), quoting *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932)). Of course, "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684. Moreover, it is impermissible for a court "to give to the words used by Congress a narrower meaning than they are manifestly intended to bear," *Trade-Mark Cases*, 100 U.S. at 98, or "to dissect an unconstitutional measure and reframe a valid one out of it *by inserting limitations it does not contain*." *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (emphasis added).

Although CTEA is silent on the issue of severability, it is immediately apparent on the face of § 102 that it cannot be severed in a way to apply only prospectively to works created *after CTEA became effective*. Subsection (b) contains the relevant portion of § 102 that applies prospectively to works created after CTEA's effective date. Pub. L. No. 105-298, § 102(b). That subsection, however, applies retroactively as well, applying generally to "works created on or after January 1, 1978." *Id.* There is no distinction made in § 102(b) between retroactive or prospective application of CTEA—between works, in other words, that are produced on or after October 27, 1998, and works created before.

Likewise, 17 U.S.C. § 302, the relevant section of the Copyright Act which was amended by § 102(b) of CTEA, suffers from the same flaw: it applies generally to "a work created on or after January 1, 1978" and contains no language whatsoever that can limit CTEA's application *to works created on or after the date CTEA became effective*. Those words simply do not appear anywhere in the provision. To insert those limiting words now is "legislative work beyond the power and function of the court." *Hill*, 259 U.S. at 70. *Cf. Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (statute that gave financial aid to students of nonpublic schools violated Establishment Clause and could not be severed to apply only to nonpublic, nonsectarian schools because "[t]he statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools").[15] As this Court has long recognized, severability cannot be achieved "by inserting [words] that are not now there." *United States v. Reese*, 92 U.S. 214, 221 (1875); *see also Reno v. ACLU*, 521 U.S. 844, 884-85 (1997) ("This Court 'will not rewrite a . . . law to conform it to constitutional requirements.'") (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988)). Accordingly, § 102 of CTEA must be struck in its entirety.

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[15] Even were it permissible for a court to insert limiting words in a statute in place of the ones found there, this Court could not merely insert "works created on or after CTEA became effective" in place of "works created on or after January 1, 1978" in 17 U.S.C. § 302, since to do so would create a gap in the law. There would be no provision in the Copyright Act to set the term duration for works created on or after January 1, 1978 but before CTEA became effective. An entirely new provision would have to be drafted to cover those works—a task which is clearly Congress's.

There is no reason in the text or history of CTEA to suppose that Congress would have enacted the prospective aspect absent its retroactive aspect. Where Congress fails to include a severability clause, and fails to craft the Act to permit severability, there is no warrant for this Court to engage in legislative drafting.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals for the D.C. Circuit and remand to the District Court for further proceedings, holding (1a) that the retroactive aspect of CTEA is beyond Congress's Copyright Clause power, or (1b) that the retroactive aspect of CTEA must be found to be "congruent and proportional" to the relevant Copyright Clause ends; (2) that copyright is not "immune" from First Amendment review, and (2a) that the retroactive aspect of CTEA violates the First Amendment or (2b) that the prospective and retroactive aspects of CTEA must be tested under intermediate First Amendment review; and (3) if the retroactive aspect of CTEA is invalid, then the prospective aspect is invalid because not severable.

Respectfully submitted,

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17 U.S.C. § 301

UNITED STATES CODE
TITLE 17. COPYRIGHTS
CHAPTER 3--DURATION OF COPYRIGHT

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to–

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to–

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

§ 302. Duration of copyright: Works created on or after January 1, 1978

(a) IN GENERAL.–Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

(b) JOINT WORKS.–In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

(c) ANONYMOUS WORKS, PSEUDONYMOUS WORKS, AND WORKS MADE FOR HIRE.–In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in

records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

(d) RECORDS RELATING TO DEATH OF AUTHORS.–Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of that person's interest, and the source of the information recorded, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent the Register considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) PRESUMPTION AS TO AUTHOR'S DEATH.–After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefit of a presumption that the author has been dead for at least 70 years. Reliance in good faith

upon this presumption shall be a complete defense to any action for infringement under this title.

§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978

(a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

(b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.

§ 304. Duration of copyright: Subsisting copyrights

(a) COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1978.– **(1)(A)** Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of–

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (other-wise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,

the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work–

(i) the author of such work, if the author is still living,

(ii) the widow, widower, or children of the author, if the author is not living,

(iii) the author's executors, if such author, widow, widower, or children are not living, or

(iv) the author's next of kin, in the absence of a will of the author,

shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which–

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which–

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

(3)(A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office–

(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1)(B) or (C) to such further term of 67 years; and

(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2)(A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of 67 years.

(4)(A) If an application to register a claim to the renewed and extended term of copyright in a work is not made within 1 year before the expiration of the original term of copyright in a work, or if the claim pursuant to such application is not registered, then a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

(B) If an application to register a claim to the renewed and extended term of copyright in a work is made within 1 year before its expiration, and the claim is registered, the certificate of such registration shall constitute prima facie evidence as to the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. The evidentiary weight to be accorded the certificates of a registration of a renewed and extended term of copyright made after the end of that 1-year period shall be within the discretion of the court.

(b) COPYRIGHTS IN THEIR RENEWAL TERM AT THE TIME OF THE EFFECTIVE DATE OF THE Sonny Bono Copyright Term Extension Act.–Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.

(c) TERMINATION OF TRANSFERS AND LICENSES COVERING EXTENDED RENEWAL TERM.–In the case of

any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this

subsection, or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2), and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of

other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's

successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

(d) TERMINATION RIGHTS PROVIDED IN SUBSECTION (C) WHICH HAVE EXPIRED ON OR before the effective date of the Sonny Bono Copyright Term Extension Act.--In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Sonny Bono Copyright Term Extension Act for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

(1) The conditions specified in subsections (c)(1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Sonny Bono Copyright Term Extension Act.

(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the

end of 75 years from the date copyright was originally secured.

§ 305. Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

CHART SHOWING CHANGES MADE BY THE CTEA AND THE DEGREE OF HARMONIZATION ACHIEVED AND DISHARMONIZATION EXACERBATED BY THE SONNY BONO COPYRIGHT TERM EXTENSION ACT (CTEA)*

By Dennis S. Karjala. Created May 15, 2002

* * *

#	Nature of Work and Author	Pre-CTEA Term	Post-CTEA Term	Directive Term in EU	Harmonized?	More or Less?
1	Natural persons >1977	50 PMA	70 PMA	70 PMA	Yes	More
2	Natural persons <1978, works published 1950-1963	28;47	28;67	70 PMA	No	No change
3	Natural persons <1978, works published 1964-1977	75	95	70 PMA	No	No change
4	Natural persons <1978, works published <1950	75 (if still in renewal term on 1/1/78, the effective date of the 1976 Act)	95 (if still in renewal term on 10/27/98, effective date of the CTEA)	70 PMA	No	No change

*The "<" and ">" signs in the Chart mean "before" and "after," respectively. Thus, for example, ">1977" means "after 1977" (or "1978 and beyond"). Also, "PMA" is short for "post mortem auctoris," or past the death of the author. Thus, 70 PMA means the term lasts for 70 years after the death of the author.

#	Nature of Work and Author	Pre-CTEA Term	Post-CTEA Term	Directive Term in EU	Harmonised?	More or Less?
5	Joint Authors >1977	50 PMA (last surviving author)	70 PMA (last surviving author)	70 PMA (last surviving author)	Yes	More
6	Joint Authors <1978, works published 1950-1963	28;47	28:67	70 PMA (last surviving author)	No	No change
7	Joint Authors <1978, works published 1964-1977	75	95	70 PMA (last surviving author)	No	No change
8	Joint Authors <1978, works published <1950	75	95 (if still in renewal term on 10/27/98, effective date of the CTEA)	70 PMA (last surviving author)	No	No change
9	Anonymous or Pseudonymous Authors >1977	Lessor of 75 from publication or 100 from creation	Lessor of 95 from publication or 120 from creation	70 from time made available to public (or 70 PMA if author's name becomes known within 70)	No	Less (or no change if author's name becomes known within 70)

#	Nature of Work and Author	Pre-CTEA Term	Post-CTEA Term	Directive Term in EU	Harmonised?	More or Less?
10	Works made for hire >1977	Lesser of 75 from publication or 100 from creation	Lesser of 95 from publication or 120 from creation	70 PMA (70 if individual author not identified in released version)	No	Less if individual author not identified, otherwise no change
11	Works made for hire <1978 (same as 2, 3, & 4 above)	28;47 (1950-1963) 75 (1964-1977) 75 (<1950)	28;67 (1950-1963) 95 (1964-1977) 95 (<1950)	70 PMA (70 if individual author not identified in released version)	No	Less if individual author not identified, otherwise no change
12	Audiovisual works >1977, created as works made for hire	Lesser of 75 from publication or 100 from creation	Lesser of 95 from publication or 120 from creation	70 PMA of principal director, screenplay author, dialogue author, or composer	No	No change
13	Audiovisual works <1978, created as works made for hire	28;47 (1950-1963) 75 (1964-1977) 75 (<1950)(if in renewal term on 1/1/78)	28;67 (1950-1963) 95 (1964-1977) 95 (<1950)(if in renewal term on 10/27/98)	70 PMA of principal director, screenplay author, dialogue author, or composer	No	No change

#	Nature of Work and Author	Pre-CTEA Term	Post-CTEA Term	Directive Term in EU	Harmonised?	More or Less?
14	Film Producers	No rights under copyright unless authors or assignees of authors	No rights under copyright unless authors or assignees of authors	"Related rights" expire at sooner of 50 years from first publication or first communication to public	No	No change
15	Broadcasting Organizations	No rights under copyright unless authors or assignees of authors	No rights under copyright unless authors or assignees of authors	"Related rights" expire 50 years after transmission	No	No change
16	Sound Recordings >1977	75 or 50 PMA, depending on nature of author	95 or 70 PMA, depending on nature of author	"Related rights" expire 50 years from sooner of first publication or first communication to public	No	Less
17	Sound Recordings 1972-1977	75	95	"Related rights" expire 50 years from sooner of first publication or first communication to public	No	Less

#	Nature of Work and Author	Pre-CTEA Term	Post-CTEA Term	Directive Term in EU	Harmonized?	More or Less?
18	Sound Recordings <1972	State law until 2047	State law until 2067	"Related rights" expire 50 years from sooner of first publication or first communication to public	No	Less
19	Unpublished works on which copyright has expired	0	0	25 from publication	No	No change
20	Unpublished works <1978 not previously copyrighted or in the public domain	Greater of 50 PMA or until 2003; if published before 2003, greater of 50 PMA or until 2028	Greater of 70 PMA or until 2003; if published before 2003, greater of 70 PMA or until 2048	70 PMA	Partially (harmonized for relatively recent works, not for older works)	More for recent works, less for older works

Sources: The columns for Pre- and Post-CTEA Terms are taken from sections 302-304 of the Copyright Act, 17 U.S.C. §§ 302-304, in each case as amended by the CTEA. The column Directive Term in the EU is based on the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, 19 OJL 290.

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No. 01-618

In the Supreme Court of the United States

ERIC ELDRED, ET AL., PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the 20-year extension of the terms of all unexpired copyrights, set forth in the Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827, violates the Copyright Clause of the Constitution insofar as it applies to works in existence when it took effect.

2. Whether the CTEA's 20-year extension of the terms of all unexpired copyrights violates the First Amendment.

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In the Supreme Court of the United States

No. 01-618

ERIC ELDRED, ET AL., PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

1. The Copyright and Patent Clause of the Constitution confers upon Congress the "Power * * * [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, Cl. 8. Enacted in 1790, the Nation's first copyright statute provided a federal copyright term of 14 years from the date of publication, renewable for an additional 14 years if the author survived the first term. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790 Copyright Act). The 1790 Copyright Act applied its renewable 14-year term to subsisting works and future ones alike. *Ibid.* Congress expanded the federal copyright term to 42 years in 1831 (28 years from publication, renewable for 14 additional years), and to 56 years in 1909 (28 years from publication, renewable for 28 additional years). Both times, Congress applied the new copyright term to newly created and subsisting works alike. Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (1831 Copyright Act); Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1080-1081 (1909 Copyright Act).

Under those statutes (and until the 1976 Copyright Act, 17 U.S.C. 101 *et seq.*), federal law was part of a dual system of copyright protection. Before a work was published, state law afforded its author an exclusive right to publish it. That "common-law copyright" or "right of first publication" attached "from the moment of [a work's] creation" and continued "in perpetuity"—"unless and until the work was published." 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 4.01[B], at 4-5 to 4-6 (1999) (*Nimmer on Copyright*); *id.* at OV-3; *id.* § 2.02, at 2-18. Accord, P. Goldstein, *Copyright* § 3.1, at 3:4-3:5 (1998); *id.* § 3.2.2, at 3:11. Following initial publication, federal copyright law granted authors an exclusive right to publish or reproduce their works during the specified term. See *Nimmer on Copyright* § 4.01[B], at 4-5. Thus, under the 1909 Copyright Act, the combined state-federal term stretched from creation to publication under state law (no matter how long that interval), *plus* up to 56 years after publication under federal law.

The 1976 Copyright Act abolished the dual system of copyright protection. Specifically, the 1976 Act preempted state law protection for unpublished works, and provided that federal protection generally would last from the work's creation until 50 years after the author's death. 17 U.S.C. 301(a), 302(a) (Supp. II 1978). The 1976 Act thus aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention Amendments of 1908). For anonymous works, pseudonymous works, or works made for hire, Congress provided a term of 75 years from publication or 100 years from creation, whichever expired first. 17 U.S.C. 302(c) (Supp. II 1978).

The 1976 Act applied the new copyright terms to all works not published by the Act's effective date, regardless of when such works were created. 17 U.S.C. 303 (Supp. II 1978). For published works with subsisting copyrights, Congress provided parity by granting a copyright term of 75 years, 17

U.S.C. 304(a) and (b) (Supp. II 1978), the average duration of a copyright under the life-plus-50-year standard. See Staff of House Comm. on the Judiciary, 87th Cong., 1st Sess., *Report of the Register of Copyrights on the General Revision of U.S. Copyright Law* 50 (Comm. Print 1961).[1]

In 1998, Congress again adjusted the terms of federal copyrights. See Copyright Term Extension Act of 1998 (CTEA or Act), Pub. L. No. 105-298, 112 Stat. 2827. Under the CTEA, most copyrights now last from creation until 70 years after the author's death. 17 U.S.C. 302(a). For anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120 years from creation, whichever expires first. 17 U.S.C. 302(c). The CTEA's standard of life-plus-70-years harmonizes the baseline United States copyright term with the term adopted by the European Union in 1993. Pet. App. 13a. Like all previous copyright term amendments, the CTEA applies its new term to future and subsisting copyrights alike. 17 U.S.C. 304.

2. Petitioners filed this lawsuit as a facial challenge to the CTEA's constitutionality. On cross-motions for judgment on the pleadings, the district court entered judgment for the government. Pet. App. 34a-39a. The court held that Congress had not violated the "limited Times" requirement of the Copyright Clause because the CTEA's term, although longer than that under the 1976 Act, is still limited rather than perpetual and thus within Congress's discretion. *Id.* at 37a & n.7. See also *id.* at 37a (noting this Court's determination that Congress may "enact retrospective laws under

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[1] Congress did not directly apply the life-plus-50-year term to previously published works because that would have shortened the duration of protection for many such works (*e.g.*, posthumously published works) and would have caused some copyrights to expire immediately. Congress did apply the life-plus-50-year term to subsisting *unpublished* works, but also provided that copyrights in such works would in any event expire no earlier than December 31, 2002, and if published by that date, no earlier than December 31, 2027. See 17 U.S.C. 303 (Supp. II 1978).

the copyright clause") (citing *McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202, 206 (1843)). The district court also held that "there are no First Amendment rights to use the copyrighted works of others." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-16a. The court unanimously held that petitioners' First Amendment claim was foreclosed by *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985). Pet. App. 5a. Copyright, the court explained, does not impermissibly restrict free speech because it grants the author an exclusive right only to the specific form of expression, not the idea or fact being expressed. See *id.* at 5a-6a.

A majority of the court of appeals also rejected petitioners' contention that the constitutional requirement that copyrights endure only for "limited [t]imes" should be "interpreted not literally but rather" in light of the Copyright Clause's "preambular statement of purpose," which is "To promote the Progress of Science and useful Arts." Pet. App. 10a. That argument was deemed foreclosed by *Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 445 U.S. 948 (1982), and by petitioners' concession that the preamble is not a substantive limit on Congress's legislative power. "[O]ne cannot concede that the preamble 'is not a substantive limit,'" the court stated, "yet maintain that it limits the permissible duration * * * more strictly than does the textual requirement that it be for a 'limited Time.'" Pet. App. 10a-11a.[2]

Because petitioners did not argue that the preambular phrase independently limits Congress's power to enact copyright legislation, the court declined to address that issue. Pet. App. 9a-11a. The court observed that if it were to address the argument, it "might well hold that the application of the CTEA to subsisting copyrights is 'plainly adapted' and 'appropriate' to 'promot[ing] progress,'" because the CTEA encourages copyright holders to restore and distribute works that might otherwise be lost forever. *Id.* at 12a (citing S. Rep. No. 315, 104th Cong., 2d Sess. 12 (1996)).

[2] The court unanimously rejected petitioners' argument that Congress "cannot extend an extant copyright," because a preexisting "copyrighted work already exists and therefore lacks originality." Pet. App. 8a. A "work with a subsisting copyright," the court explained, "has already satisfied the requirement of originality, and need not do so anew for its copyright to persist." *Ibid.*

Finally, the court held that nothing in the constitutional text or its history "suggests that a term of years for a copyright is not a 'limited Time' if it may later be extended for another 'limited Time.'" Pet. App. 12a-13a. The First Congress "made the Copyright Act of 1790 applicable to subsisting copyrights arising under [state] copyright laws," *id.* at 13a, and that practical construction of the Constitution by the Framing generation "is of itself entitled to very great" and sometimes "almost conclusive" weight. *Id.* at 14a. Furthermore, the court of appeals found that *McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202, 206 (1843), made it "plain" that Congress can "amplify the terms of an existing patent." Pet. App. 14a-15a.

In rejecting petitioners' assertion that Congress might string together "an unlimited number of 'limited Times,'" the court held that such "clearly is not the situation before us." Pet. App. 13a. The CTEA merely "matches United States copyrights to the terms of copyrights granted by the European Union." *Ibid.* "In an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits" and is "a 'necessary and proper' measure to meet contemporary circumstances rather than a step on the way to making copyrights perpetual." *Ibid.*

Judge Sentelle dissented in part. He concluded that Congress had exceeded its power under the Copyright Clause by expanding the term of subsisting works. Pet. App. 16a-23a.

4. The court of appeals denied rehearing and rehearing en banc. Pet. App. 24a-27a. The majority clarified that, because petitioners had not argued that the preambular phrase is an independently cognizable limit on Congress's copyright

powers, that issue was not properly before the court. *Id.* at 25a. Judge Sentelle, joined by Judge Tatel, dissented. *Id.* at 28a-33a.

This Court granted certiorari, limited to the first two questions presented in the petition. 122 S. Ct. 1062; 122 S. Ct. 1170.

SUMMARY OF ARGUMENT

I. Every congressional modification of copyright terms in United States history has been applied to both future and subsisting works. Since the CTEA's term of life-plus-70-years is not unlimited or perpetual, it satisfies the constitutional mandate that copyrights last only for "limited Times." Within that one constraint, Congress's choice of particular copyright terms, and of works protected thereby, is entitled to great deference and must be upheld if that choice is a necessary and proper exercise of legislative power.

Congress's decision to apply the CTEA to subsisting works meets that test. First, it is rational for Congress to treat authors' original works equally, regardless of whether created before or after the CTEA's enactment. Congress reasonably determined that demographic, economic, and technological changes warrant a longer term for all unexpired copyrights. Allowing fair compensation for holders of existing copyrights accomplishes that goal directly, and is also necessary and proper as an ancillary means of protecting future works. Congress might be less likely to respond to a perceived need to modify the term of copyright protection if it could not do so in a manner it deemed equitable. Further, this country's practice of granting evenhanded protection to authors of existing works—a tradition followed in statutes dating from the 1790 Copyright Act forward—increases incentives for the creation of future works and for initially publishing those works in the United States. Especially in a global market, Congress's decision to conform to certain international copyright standards rationally allows United States copyright holders to meet foreign competition

and thereby provides revenues to be invested in producing new works. Congress also rationally concluded that the CTEA's longer term would encourage holders of existing copyrights to make substantial investments in restoring and distributing their works, to the benefit of public discourse.

Petitioners in effect ask this Court to rewrite the governing constitutional language to allow Congress to secure copyrights only for "*inalterable* limited times *that promote the creation of new works.*" Neither the Constitution's text nor its history supports such substantial revisions, and two centuries of legislative practice and judicial decisions stand to the contrary.

Petitioners suggest that, although the CTEA's term is not impermissibly long, future courts might be unable to distinguish "limited Times" such as the CTEA's term from hypothetically unlimited, perpetual copyrights that Congress might someday enact. Congress has significantly revised the federal copyright term only five times in 210 years, however, and there is no basis for believing that upholding the CTEA would either lead Congress to adopt unlimited copyright extensions or require the courts to uphold such extensions. Ultimately, petitioners wish to displace Congress's preference for copyright-based dissemination of works during the CTEA's prescribed proprietary term, and instead to allow indiscriminate exploitation by public domain copyists like petitioners. But the Constitution assigns such policy choices to Congress, not the courts.

II. The CTEA does not impermissibly abridge freedom of speech. All copyright law, including the CTEA, protects authors' writings from unrestricted exploitation by others for "limited Times." This Court has recognized that the copyright system does not offend the First Amendment because it allows unrestricted use of the ideas and facts within copyrighted works, and also allows "fair use" of copyrighted expression itself. *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985). Since the CTEA fully preserves copyright's traditional safeguards for free speech,

it satisfies First Amendment standards under this Court's jurisprudence.

ARGUMENT

I. THE "LIMITED TIMES" REQUIREMENT DOES NOT PRECLUDE CONGRESS FROM APPLYING NEW COPYRIGHT TERMS TO FUTURE AND EXISTING COPYRIGHTS ALIKE

Throughout this Nation's history, Congress has exercised its power under the Copyright Clause (U.S. Const. Art. I, § 8, Cl. 8) by establishing and revising the "limited Times" during which federal copyright protection endures. Each time Congress has done so—in 1790, 1831, 1909, 1976, and most recently in 1998—Congress has applied the revised copyright term not only to future works, but to subsisting works as well. As Professor Arthur Miller observed, "since 1790, it has indeed been Congress's policy that the author of yesterday's work should not get a lesser reward than the author of tomorrow's work just because Congress passed a statute lengthening the term today." Symposium, *The Constitutionality of Copyright Term Extension*, 18 Cardozo Arts & Ent. L.J. 651, 693 (2000).

Petitioners seek to countermand that established policy by arguing that the "limited Times" requirement bars Congress from applying new copyright terms to subsisting works. That argument is contrary to constitutional text and contradicts the First Congress's construction of the Constitution. Further, petitioners' argument ignores that Congress "may * * * implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Graham* v. *John Deere Co.*, 383 U.S. 1, 6 (1966). Congress's longstanding practice of according authors of existing works the benefits of after-enacted legislation is a necessary and proper component of copyright legislation. Congress has reasonably concluded that its consistent practice *does* promote creativity and progress: It assures authors that they will not be unfairly

penalized for creating or publishing earlier rather than later; it gives owners of subsisting copyrights greater incentives to preserve, restore, disseminate, and publicly exploit works that would otherwise be lost forever; and it secures appropriate international protection for United States copyright holders' works, thereby also fostering international harmonization.

Petitioners place great weight on their exaggerated claim that Congress "now regularly escapes the restriction of 'limited Times' by repeatedly extending terms of existing copyrights—eleven times in the past forty years." Pet. Br. 2, 10, 18, 31. But petitioners fail to mention that all but two of those 11 purported changes (the 1976 Copyright Act and the CTEA) were temporary placeholders *subsumed* into the systemic change effected by the 1976 Copyright Act. In fact, Congress has made only two ultimate changes to copyright terms over the last 90 years, responding to rapid changes in economic, technological, international, and demographic circumstances. Indeed, the CTEA's "limited time" is in many respects shorter than the total term of protection provided, under a combination of state and federal law, during the first 180 years of the Republic. See pp. 24-25, *infra*.

Petitioners, in any event, do not assert that the CTEA's copyright term, as applied to future works, exceeds the "limited Times" requirement. On the contrary, they expressly disavow such a claim. Pet. Br. 14. But if the duration of the copyright term provided by the CTEA is "limited" as applied to future works, it must necessarily be "limited" as applied to existing ones as well.

A. Petitioners' Construction Is Foreclosed By Constitutional Text

The Copyright Clause does not textually distinguish between subsisting and future copyrights; it distinguishes between "limited" and "unlimited" periods of protection. Petitioners do not dispute that the CTEA's term is "limited" as applied to future works. Consequently, they struggle in

vain to define *the exact same time period* as "limited" when applied to one set of works (future works), but "unlimited" when applied to others (existing works).[3]

Petitioners' argument rests on the premise that a copyright term is not limited in the first instance if Congress can later increase it. But that confuses "limited Times" with "limited *and inalterable* times." At the time of the Framing, the term "limited" meant (as it does today) "confine[d] within certain bounds," "restrain[ed]," or "circumscribe[d]," T. Sheridan, *A Complete Dictionary of the English Language* (1789); 2 S. Johnson, *A Dictionary of the English Language (1755)* (1968) (*Johnson Dictionary*) (same); see also *Webster's New Int'l Dictionary* 1434 (2d ed. 1958) ("confined within limits"). Plainly, the copyright term provided by the CTEA is "limited" in that sense. It "confine[s]," "circumscribe[s]," and "bound[s]" the temporal scope of the author's exclusive right. Congress does not render a copyright term "unlimited" merely by extending the initial grant of protection, any more than courts render the time for filing briefs "unlimited" when they adjust briefing schedules, or than Congress renders statutes-of-limitations periods "unlimited" when it alters the "limited time" for initiating a lawsuit. As the district court observed, "If a limited time is extended for a limited time then it remains a limited time." Pet. App. 37a, n.7. The Framers' choice of the plural noun, empowering Congress to grant authors and inventors exclusive rights for "limited *Times*," also belies any intent to require a single, inalterable period.

Petitioners claim (Br. 17) that "limited" means "fixed," as opposed to changeable or variable. However, they cite no source from the Framing to support that definition, and the

[3] Petitioners imprecisely describe the application of a new term to subsisting works as "retroactive." Such new copyright terms govern the legality of *future* copying; they do not change the legal status of copying that has already occurred. Thus, the CTEA does not eliminate "vested rights" or attach new disabilities to past transactions. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269, 280 (1994).

modern dictionary they cite demonstrates that "fixed" is not an accepted meaning of "limited" and was not so at the time of the Framing.[4] Petitioners also claim (Br. 17-19) that "limited" means "certain," as in predictable or definite, stating that Charles Pinckney's proposed draft of the Copyright Clause used the phrase "a certain time" rather than "limited Times." In context, however, even "certain" would not have meant predictable or inalterable, since "certain" was (and is) often used "in an indefinite sense," to mean "some," "particular," or "specified." 1 *Johnson Dictionary*, *supra*; 2 *Oxford English Dictionary* 234 (1978) ("particularize[d] from the general mass, but which may be left without further identification or description"). In any event, although the Framers incorporated some elements from the Pinckney draft, they *rejected* the phrase "a certain time" and chose "limited Times" instead. Hence, though a word such as "fixed" or "inalterable" could have been used to restrict legislative power as petitioners propose, it is dispositive that no such word appears in the Constitution as written.

B. Historical Practice Confirms That "Limited Times" Does Not Mean A Single, Inalterable, Limited Time

"[E]arly congressional practice * * * provides 'contemporaneous and weighty evidence of the Constitution's meaning.'" *Alden* v. *Maine*, 527 U.S. 706, 743-744 (1999) (quoting *Printz* v. *United States*, 521 U.S. 898, 905 (1997)). As the Court observed in the copyright context:

> The construction placed upon the Constitution by the first [copyright] act of 1790 and the act of 1802, by the

[4] Petitioners cite *Webster's Second New International Dictionary* 1434 (1950), but omit the notation "*Obs.*," for "obsolete," which Webster's employs when the word has not been used with that meaning "in any important literary work since 1660"—over a century before the Constitution was drafted. *Id.* at xcii, 1682. See also *Webster's Third New Int'l Dictionary* 16a (1993) (indicating that the "temporal label *obs.* for 'obsolete' means that no evidence of standard use since 1755 has been found or is likely to be found").

> men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.

Burrow-Giles Lithographic Co. v. *Sarony*, 111 U.S. 53, 57 (1884). In this case, "contemporaneous legislative exposition, * * * acquiesced in for" more than two centuries, precludes petitioners' construction. *Myers* v. *United States*, 272 U.S. 52, 175 (1926).

1. First, it is significant that Congress has never provided for an inflexibly "fixed" or "certain" copyright term. Under the 1790 Copyright Act, for example, federal protection lasted for 14 years after a work's publication, and could be renewed for an additional 14 years *if* the author survived and applied for an additional term. See p. 1, *supra*. Similarly, under the 1831 and 1909 Copyright Acts, an author or eligible heir could seek renewal at the close of the initial term. *Ibid.*

Congress, moreover, has consistently applied new copyright terms to subsisting works. The 1790 Copyright Act applied its new term—up to 28 years of protection—to works "*already printed* within these United States"; to works "*already made and composed*, and not printed or published"; and finally to works "that *shall hereafter* be made and composed." Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (emphases added). Previously published works were among the first protected under that 1790 statute. See B. Bugbee, *Genesis of American Patent & Copyright Law* 155 (1967). The 1790 Copyright Act, moreover, granted a longer term of protection than was available under many state laws at the time those works were created.[5] The First Congress thus

[5] Whereas the new federal term could last up to 28 years, North Carolina had granted a single 14-year term, N.C. Copyright Act of 1785, ¶ 2; New Hampshire had provided a single 20-year term, N.H. Copyright Act of 1783, ¶ 2; and Massachusetts, Rhode Island, and Virginia had provided a single 21-year term, Mass. Copyright Act of 1783, ¶ 3; R.I. Copyright Act of 1783, ¶ 2; Va. Copyright Act of 1785, § 1. Delaware never enacted a copyright law, and Maryland's and Pennsylvania's copyright statutes never became effective. Md. Copyright Act of 1783, § VI (Act to become effective only after adoption of similar laws by all States); Penn. Copyright Act of 1784, § VII (similar). See generally Library of Congress, *Copyright Enactments of the United States 1783-1906* (1906) (reprinting state statutes).

unquestionably understood that it had authority to apply a new, more favorable copyright term to existing works.

Each Copyright Act since 1790 has reflected that understanding. In 1831, when Congress doubled the initial term (from 14 to 28 years following publication), Congress applied that benefit to future works and subsisting copyrights alike. Act of Feb. 3, 1831, ch. 16, § 16, 4 Stat. 439. When Congress in 1909 changed the renewal term from 14 years to 28 years, it also applied that change to both future and subsisting copyrights, Act of Mar. 4, 1909, ch. 320, § 24, 35 Stat. 1080-1081; and the changed copyright term under the 1976 Act again accorded durational parity to future and existing copyrights. See 17 U.S.C. 302-304 (Supp. II 1978); pp. 2-3 & n.1, *supra*.

Petitioners' view is likewise inconsistent with Congress's historical practice of using its Copyright and Patent Clause authority to extend the terms of individual patents and copyrights for equitable reasons, such as where the creator had not obtained the "fair" return the prior Congress presumably had contemplated. In 1808, Congress extended the term of one individual's patent for such reasons, Act of Jan. 7, 1808, ch. 6, 6 Stat. 70; it extended the term of another in 1809, Act of Mar. 3, 1809, ch. 35, 6 Stat. 80; it did so again in 1815, Act of Feb. 7, 1815, ch. 36, 6 Stat. 147, and many times thereafter. See T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyright Soc'y of the U.S. 19, 65, 72 (2001). Since 1828, Congress has likewise enacted private bills to extend copy-

rights for individual, existing works. See, *e.g.*, Act of May 24, 1828, ch. 145, 6 Stat. 389 (extending term of copyright granted to J. Rowlett); T. Ochoa, 49 J. Copyright Soc'y of the U.S. at 48-49.[6]

Significantly, such extensions were upheld by the courts. In rejecting a challenge to the 1808 patent extension, Justice Bushrod Washington—a member of the 1787 Virginia House of Delegates that ratified the Constitution—declared that Congresses "have the exclusive right by the constitution to limit the times for which a patent right shall be granted, and are not restrained from renewing a patent or prolonging the time of its continuation." *Evans* v. *Robinson*, 8 F. Cas. 886 (C.C.D. Md. 1813) (No. 4571), aff'd, 16 U.S. (3 Wheat.) 454 (1818); accord *Evans* v. *Jordan*, 8 F. Cas. 872 (C.C.D. Va. 1813) (No. 4564) (Washington, J.), aff'd, 13 U.S. (9 Cranch) 199 (1815). Justice Story would later reach the same conclusion, specifically affirming Congress's authority to enact a 14-year patent extension that "operates retrospectively":

> For myself, I have never entertained any doubt of the constitutional authority of congress to make such a grant. * * * [I]t rests in the sound discretion of congress to say when and for what length of time and under what circumstances the patent for an invention shall be granted. There is no restriction, which limits the power of congress to enact, where the invention has not been known or used by the public.

Blanchard v. *Sprague*, 3 Fed. Cas. 648, 650 (C.C.D. Mass. 1839) (No. 1518). Thus, while petitioners repeatedly cite

[6] Petitioners (Br. 20-21) and their amici (Ochoa Br. 23-24) assert that Rowlett's 1828 term extension relied on the "sweat of the brow" doctrine rejected in *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991). Whatever the validity of Rowlett's *initial copyright*, however, Congress's decision to extend it manifested Congress's clear understanding that the "limited Times" requirement does not bar Congress from substituting a new term for an earlier one that seems inadequate.

Justice Story as reflecting the Framers' "clear intent," Pet. Br. 10, 12, 39, Justice Story ruled that Congress *could* extend the terms of protection for subsisting works.[7] As an amicus supporting petitioners concedes (in his article but not in his brief), petitioners' proposed bar on term extensions for existing works is "difficult to maintain in light of the long history of patent term extensions which were upheld in the mid-nineteenth century." Ochoa, 49 J. Copyright Soc'y of the U.S. at 125.

2. Petitioners concede (Pet. Br. 30) that their contention "would cast into doubt the 1831 and 1909 Acts, and possibly the 1976 Act" as well. Nonetheless, petitioners and their amici dismiss those Acts as "mistaken" because "no Framer sat in Congress in 1831," Pet. Br. 31, and only one "delegate to the 1787 Constitutional Convention * * * remained in Congress" in 1808, Ochoa Br. 23. Those contentions overlook, however, that then-President Thomas Jefferson—the first administrator of the patent system, and perhaps the Founder with the narrowest view of the copyright and patent powers—signed the 1808 and 1809 patent term extensions into law; that James Madison, who drafted the Constitution's "limited Times" language, issued the extended patents under those laws as Secretary of State; and that Madison as President signed another patent term extension in 1815. See pp. 13-14, *supra*. Petitioners and their amici thus ask this Court to repudiate two centuries of

[7] Petitioners' reliance (Br. 10, 12) on Justice Story's characterization of copyright terms as "short" is also misplaced. First, petitioners do not allege that the CTEA's term is too "long" to be "limited." Pet. Br. 14. Second, "limited" does not mean "short," and even in Justice Story's time copyright protection ran from creation to publication under state law (no matter how long that interval), *plus* 42 additional years after publication under federal law. Third, contrary to petitioners' incomplete quotations, Justice Story did not declare that works must "pass into the public domain 'without restraint,'" but rather that, *upon the expiration of the patent or copyright*, the works become available to the public for "full possession and enjoyment * * * without restraint." J. Story, *Commentaries on the Constitution* § 558, at 402-403 (photo. reprint 1987) (1832).

settled practice as resting on a "mistaken" understanding that James Madison, Thomas Jefferson, and Justices Washington and Story all apparently shared.[8]

Petitioners' theory also cannot credibly be reconciled with the 1790 Copyright Act. Petitioners' fundamental submission would forbid any extension of existing copyrights "because the incentive is being given for work that has already been produced." Pet. Br. 22. But petitioners concede that the 1790 Copyright Act applied its new copyright term to works that had "already been produced." And although petitioners assert that the 1790 Act "did not extend the terms of existing copyrights" but rather "created" new ones, *id.* at 28, that makes no difference under petitioners' theory. In petitioners' view, Congress may not provide *any* incentive regarding subsisting works, because the works have "already been produced." *Id.* at 22, 28. Moreover, the First Congress did not merely apply its new copyright term to subsisting works; it *extended* and *strengthened* legal protection (temporally and geographically) beyond that available when the authors created them. See pp. 12-13 & n.5, *supra*.

Recognizing as much, petitioners claim (Br. 30) that the 1790 Act merely "address[ed] fundamental issues of transition" from the prior state-law system using a "relatively

[8] Petitioners suggest (Pet. Br. 29; Ochoa Br. 25-26) that the 1831 Congress "mistakenly" understood copyright to be a creature of "natural law," a view that (they claim) was rejected two years later in *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591 (1834). But two years *after Wheaton*, Congress altered the terms for patents—which were never thought to derive from natural rights—and applied the alteration to both existing and future inventions. Act of July 4, 1836, ch. 357, § 5, 5 Stat. 119. Moreover, "natural rights" theories aside, the phrase "limited Times" either bars Congress from applying new copyright terms to existing works or it does not; the 1831 Congress was obviously of the latter view, primarily based on utilitarian reasoning, 7 Cong. Deb. 424 (1831) (stating that the Act would "enhance the literary character of the country," and decrying proposals to punish authors for publishing earlier rather than later). See also p. 30, *infra*.

uncumbersome method." That is unpersuasive. The "limited Times" requirement does not contain any "transition" exception, and petitioners never explain how applying the 1790 regime *to existing works*—thereby imposing new registration and deposit requirements (see 1790 Copyright Act, ch. 15, §§ 1, 3, 1 Stat. 124-125)—made the transition significantly less cumbersome. The First Congress did not describe the 1790 Act's application to existing works as a one-time necessity, and successive Congresses have also applied new terms to existing works. Besides, to the extent that addressing transitional issues, enhancing uniformity, and avoiding cumbersome results are permissible justifications, they also support the CTEA. See pp. 37-38, *infra*.[9]

3. Preconstitutional practice similarly undermines petitioners' position. The Statute of Anne, a partial model for the 1790 Act, applied a new copyright term to existing works. See 8 Anne, ch. 19 (1710) (Eng.). So did the preconstitutional state copyright statutes, which served as "examples to national lawmakers—of whom some" (including Madison and Pinckney) "were the very men who had drafted, considered or supported these state laws." Bugbee, *supra*, at 124.[10] Neither constitutional text nor contemporaneous debates suggest any unstated intent to ban that

[9] Petitioners' related assertion (Br. 28-29) that the federal term was "compensation" for displaced state- or common-law protections is based on the dubious premise that such protections were pre-empted, Bugbee, *supra*, at 124, and overlooks that state copyright terms were often shorter than the federal copyright term, and were in three instances nonexistent. See pp. 12-13 & n.5, *supra*. In any event, petitioners' claim that the 1790 Copyright Act permissibly "compensate[d]" authors of previously created works is fundamentally inconsistent with their general theory.

[10] Three state statutes, like the 1790 Copyright Act, accorded protection to all previously printed works. S.C. Copyright Act of 1784, ¶ 1; Va. Copyright Act of 1785, § 1; N.Y. Copyright Act of 1786, ¶ 1. Six protected works created before, but printed after, the statute's enactment. N.C. Copyright Act of 1785, ¶ 2; N.J. Copyright Act of 1783, § 1; Ga. Copyright Act of 1786, ¶ 2; Mass. Copyright Act of 1783, ¶ 4; N.H. Copyright Act of 1783, ¶ 2; R.I. Copyright Act of 1783, ¶ 3.

established, preconstitutional practice, which Congress has continued for centuries since.

Lacking support anywhere in the Constitution's text, structure, drafting history, or implementation, petitioners instead cite the Framers' alleged general antipathy toward monopolies and toward the "strong control" and censorship that publishers had exercised in England. Pet. Br. 24-26. But petitioners cite no evidence that the Framers responded by prohibiting Congress from altering copyright terms for both existing and future works. To the contrary, petitioners concede that the Framers' principal response was to grant exclusive rights to *authors* and *inventors*—who were numerous, diffuse, and whose works would naturally compete with each other—thereby checking market power and centralized control without restricting legislative authority. *Id.* at 26-27. With respect to selecting and modifying statutorily "limited Times," the Framers placed their faith in the people's representatives by generally assigning Congress "the task of defining the scope of the limited monopoly that should be granted to authors or inventors in order to give the public appropriate access to their work product." *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).[11]

C. Petitioners' Construction Of "Limited Times" In Light Of The Preamble Contradicts Constitutional Text And Case Law

Petitioners do not argue that the Copyright Clause's preamble is an independently enforceable limit on Congress's powers; in the court of appeals, petitioners conceded that it is not. Pet. App. 10a. The court of appeals therefore held

[11] Indeed, responding to Thomas Jefferson's concerns about the evils of monopoly, Madison asked: "Is there not also infinitely less danger of this abuse in our Governments than in most others?" Where, "as with us," "the power * * * is in the many not in the few the danger cannot be very great that the few will be thus favored." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 1 *The Republic of Letters* 566 (J. Smith ed. 1995).

that the preamble's independent enforceability was not properly before it, *id.* at 11a-12a, 24a-27a, and this Court declined to review that conclusion, see Order of Feb. 25, 2002 (limiting grant of certiorari).

Nonetheless, petitioners argue that the meaning of the "limited Times" requirement "must be determined in light of [the preamble's] specified end." Pet. Br. 19. But petitioners do not show how such illumination could convert "limited Times" into "a single and inalterable limited Time." In effect, petitioners boldly propose to rewrite the Copyright Clause, moving the phrase "To promote the Progress" to a position after "limited Times," and transforming that phrase into an adjectival limitation. An "extension of existing copyrights cannot be a 'limited Time[]' *that* 'promote[s] the Progress of Science,'" petitioners argue, "because the incentive is being given for work that has already been produced." *Id.* at 22 (emphasis added).

That argument is textually incoherent. The Framers did not require Congress to select "*limited Times that* promote" progress, any more than they intended so to limit or modify other nouns in the Clause, *i.e.*, by allowing Congress to protect only "*Authors that* promote" progress, or "*Writings that* promote" progress. See *Mitchell Bros. Film Group* v. *Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980). By proposing to convert the Constitution's grant of power into a limitation, petitioners seek to avoid the ordinary "necessary and proper" standard of review applicable to Congress's Article I enactments. See *ibid.*; pp. 28-29, *infra*. As Nimmer explains, the preamble "must be read as largely * * * indicating the purpose of the power but not in limitation of its exercise." 1 *Nimmer on Copyright* § 1.03[A], at 1-66.19 (footnotes omitted). Especially in light of Congress's longstanding and consistent legislative practice, see pp. 11-18, *supra*, petitioners' attempt to rewrite the Copyright Clause must be rejected.

This Court's cases similarly contradict petitioners' argument. In *McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202 (1843), for example, the Court applied changes in patent law to a plaintiff's previously granted patent:

> [The applicable law] depend[s] on the law as it stood at the emanation of the patent, *together with such changes as have been since made; for though they may be retrospective in their operation, that is not a sound objection to their validity*; the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, *there can be no limitation of their right to modify them at their pleasure*, so that they do not take away the rights of property in existing patents.

Id. at 206 (emphases added). The Court recognized that the disputed patent "would have been void" when the process was patented (1834-1835), because the patentee had allowed his employer briefly to practice the invention before obtaining the patent. *Id.* at 205, 207. But the Court held that an 1839 amendment, which exempted brief uses by an employer, had "relieved" the plaintiff "from the effects of former laws and their constructions by this court." *Id.* at 209. Petitioners cannot explain how their theory would permit Congress to apply an 1839 amendment to a process patented years earlier, since the change could not (in their view) operate as an incentive to invent and disclose that (already invented and disclosed) process. *McClurg* similarly refutes petitioners' claim that the Copyright Clause requires a "quid pro quo" of new creation in exchange for any increased legal protection, Pet. Br. 16, 23.[12]

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[12] While a quid pro quo concept occasionally appears in this Court's cases, it ordinarily describes the conditions *Congress* has established for *patents*, *e.g.*, disclosure to the public in exchange for a period of exclusive rights. See, *e.g.*, *Pennock* v. *Dialogue*, 27 U.S. (2 Pet.) 1, 23 (1829) (if an invention is already commonly known and used when the patent is sought, "there might be sound reason for presuming, *that the legislature* did not intend to grant an exclusive right" given the absence of a "quid pro quo." (emphasis added)). None of the cases cited by petitioners holds that Congress is precluded from enhancing copyright protections for subsisting works.

Although both courts below relied on *McClurg* expressly, Pet. App. 14a-15a, 37a, petitioners fail even to mention that decision. Instead, petitioners rely on *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991), which does not analyze "limited Times" and does not support petitioners' theory. *Feist* held that, because copyright requires originality—some creative effort by the author—factual compilations are subject to copyright only if, and only to the extent that, the author adds creativity by independently selecting and arranging the facts. See *id.* at 346-348; pp. 22-23 n.14, *infra*. *Feist* derived that requirement not from the Copyright Clause's preamble (as petitioners contend), but rather from the words "Writings" and "Authors" in the Clause itself. "In two decisions from the late 19th century," *Feist* observes, "this Court defined the crucial terms 'authors' and 'writings'" and, "[i]n so doing, * * * made it unmistakably clear that *these terms* presuppose a degree of originality." 499 U.S. at 346 (emphasis added). Similarly, *Feist* explains that one cannot be the "author" of "facts" because facts have an independent existence and thus do not "owe [their] origin" to an "author" as "maker." *Ibid.*[13]

Petitioners' reliance (Br. 21) on *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), and *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966), is also misplaced. Like *Feist*, those cases did not concern "limited Times," the validity of an Act of Congress, or the application of new copyright

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[13] The Court mentioned the preamble only once in *Feist*, and it did so to explain why others may use the "fruits of the compiler's labor," such as facts and ideas, without compensation. Because "the primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts,'" the Court explained, copyright protects the "author's original expression, but allows others to build freely upon the *ideas* and *information* conveyed by a work." 499 U.S. at 350 (emphasis added).

terms to subsisting works. In fact, *Bonito Boats* invalidated a *state* law because it "clashe[d] with the balance struck *by Congress* in our patent laws." 489 U.S. at 152 (emphasis added). "It is *for Congress* to determine," the Court declared, "if the present system" effectuates the Copyright and Patent Clause's goals. *Id.* at 168; see *id.* at 165-167 (emphasizing that Congress may balance competing concerns). *Graham* concerned the construction and application of the 1952 Patent Act, and dictum in that case emphasized that Congress "may implement the stated purpose of the Framers by selecting the policy which *in its judgment* best effectuates the constitutional aim." 383 U.S. at 6 (emphasis added).

Petitioners rely (Br. 21) on this Court's statement that Congress may not "remove existent knowledge from the public domain." *Bonito Boats*, 489 U.S. at 146 (quoting *Graham*, 383 U.S. at 6). But the CTEA does not remove anything from the public domain. Like an initial term of copyright, it merely delays the entry of an author's original expression into the public domain. More fundamentally, copyrights cannot "remove existent *knowledge* from the public domain," because copyright protects only the author's particular expression and (unlike a patent) does not bar others from exploiting the underlying idea or knowledge. See pp. 40-41, *infra*. Indeed, even if there were some barrier against reclaiming particular expression from the public domain—an issue that should be reserved for another day—it would not naturally derive from the language of the preamble. See Br. in Opp. 14.[14]

[14] Petitioners mischaracterize *Bonito Boats* as having "held" that "'monopolies' are *not permitted* under the Copyright Clause when there is no 'concomitant *advance* in the Progress of Science and useful Arts.'" Pet. 21 (some emphasis added). In fact, *Bonito Boats* merely noted that the Patent Clause "*reflects a balance* between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance." 489 U.S. at 146 (emphasis added). Moreover, unlike patent law's "novelty" requirement (discussed in *Bonito Boats*), copyright's "originality" requirement does not demand an "advance" over prior art. Instead, an author may obtain protection for expression or an "arrangement *that others have used*; novelty is not required. Originality requires only that the author make" his creative contribution "independently (*i.e.*, without copying that selection or arrangement from another work)." *Feist*, 499 U.S. at 358 (emphasis added). See *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir.) (Hand, J.), cert. denied, 298 U.S. 669 (1936).

As the court of appeals unanimously recognized, applying the CTEA to subsisting copyrights does not (as petitioners contend) protect works that lack originality. The CTEA, like the 1790 Copyright Act, merely applies a new copyright term to "original" works that properly qualified for copyright protection in the first instance. Pet. App. 9a. Contrary to petitioners' argument (Br. 32-33), *Feist*'s "originality" requirement determines only whether a work is eligible for copyright protection; it has no relevance to the "limited Times" for which a work may be protected. Indeed, petitioners' interpretation of the originality requirement would invalidate the copyright acts passed by the First Congress and by Congresses thereafter, each of which applied new copyright terms to subsisting works.

D. Petitioners' Concerns About Perpetual Protection Are Unfounded

Petitioners' argument ultimately rests on a bleak prophecy that—unless this Court bars the application of new copyright terms to existing works—Congress might continually increase terms to provide "a perpetual term 'on the installment plan.'" Pet. Br. 18. But that has not happened here. Congress merely established a longer, but still "limited," copyright term that our trading partners had adopted, and it applied that term evenhandedly to future and subsisting works alike.

History belies petitioners' claim that Congress "now regularly escapes the restriction of 'limited Times' by repeatedly extending terms of existing copyrights." Pet. Br. 2. During this country's first 120 years, Congress significantly altered

copyright terms three times: In 1790, Congress established a term of up to 28 years following publication, which it increased to 42 years in 1831, and to 56 years in 1909. See pp. 1, 12-13, *supra*. In the last 90 years, Congress has ultimately altered the federal copyright term only twice, adopting a term of life-of-the-author plus 50 years in 1976, and increasing it to life-plus-70-years in 1998.[15] Of those two recent term amendments, the 1976 Act *reduced* many works' total copyright term. Before the 1976 Act, unpublished works could receive potentially infinite protection under state law ("common-law copyright"). See p. 2, *supra*. By preempting state law protection in favor of a single, finite, federal term, the 1976 Act "played a major role in harmonizing and, to some extent, curtailing the duration of copyright, at least with respect to that deceptively large class of unpublished works formerly protected by common law copyright." 18 Cardozo Arts & Ent. L.J. at 693 (Prof. Ginsburg). See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 134-135, 139 (1976). Indeed, that curtailment will cause centuries of unpublished works, previously entitled to eternal protection, to enter the public domain on December 31, 2002. See p. 3 n.1, *supra*. Moreover, although petitioners claim that the 1976 Act increased the average copyright term by 19 years (from 56 years under the 1909 Act to an average of 75 years), they overlook that the total pre-1976 term had lasted from creation to publication under state law, see, *e.g.*,

[15] With respect to term extensions enacted between 1962 and 1976 (Pet. Br. 2 & n.1), while Congress was drafting the 1976 Copyright Act, "[e]verybody knew that when the 1976 Act was enacted, the worldwide life plus fifty standard was going to be adopted. Congress determined that works whose copyrights would expire during the time the Act was being revised should not be left behind simply because Congress took fifteen years to enact what became the 1976 Copyright Act." 18 Cardozo Arts & Ent. L.J. at 693 (Prof. Ginsburg). Those extensions thus were incorporated into, and wholly replaced by, the term established by the 1976 Copyright Act. See p. 9, *supra* (correcting petitioners' claim that Congress has increased copyright terms 11 times in 40 years).

1909 Act, ch. 320, § 2, 35 Stat. 1076, *plus* 56 *additional* years after publication under federal law. See p. 2, *supra*.

Historical practice also demonstrates that Congress has been rather conservative in revising copyright terms. When Congress altered the federal copyright term in 1831, it recognized that many European nations had already adopted terms of life-plus-50-years or longer. H.R. Rep. No. 3, 21st Cong., 2d Sess. 2 (1831). Congress declined to adopt that standard, instead increasing the maximum federal term from 28 years to 42 years. When Congress revisited the issue in 1909, life-plus-50-years had become the international standard under amendments to the Berne Convention. But Congress again did not adopt that standard, instead increasing the maximum federal term to 56 years. It was not until 67 years later, in 1976, that Congress finally adopted the then-prevailing international standard.

By 1976, however, demographic and economic changes had overtaken that standard. The Berne Convention had incorporated the life-plus-50-year term in 1908 to provide compensation during authors' lives and during the lives of any children or grandchildren.[16] Because life expectancies increased substantially during the 20th century (for offspring as well as authors), and because people now often have children later in life, the European Union in 1993 altered the term to life-plus-70-years. See E.U. Directive on Copyright, pmbl. ¶ 5 (because the "average lifespan in the Community has grown longer," the prior term "is no longer sufficient to cover two generations"). Viewed against that background, Congress hardly acted precipitously when it likewise found the life-plus-50-year term inadequate and changed the United States copyright term to life-plus-70-years. See also

[16] See *Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights*, 1993 Official J. Eur. Cmty. 290, pmbl. ¶ 5 (E.U. Directive on Copyright) ("[T]he minimum term of protection laid down by the Berne Convention * * * was intended to provide protection for the author and the first two generations of his descendants.").

p. 33 & nn.23-24, *infra*. To the contrary, that change was "overdue." 141 Cong. Rec. 6553-6554 (1995) (statement of Sen. Feinstein).

The two increases in copyright terms effected since the 1909 Act are proportionate to demographic and economic changes during the same period. Between 1900 and today, the average life span has increased by as much as 30 years; photocopying and digital media have lowered copying costs; new markets and media have increased the value and commercial life of works; and losses due to piracy have increased. S. Rep. No. 315, 104th Cong., 2d Sess. 12 (1996); W. Landes & R. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 363 (1989) (Landes & Posner). Under traditional copyright policy, each of those changes tends to justify a longer copyright term. See H.R. Rep. No. 1476, *supra*, at 134-135; S. Rep. No. 315, *supra*, at 6, 12; Landes & Posner, *supra*, at 344 ("optimal extent of copyright protection tends to rise with the value of a work"); *id.* at 363 ("the lower the cost of copying the greater the optimal scope of copyright protection").[17]

[17] Even though petitioners do not claim that life-plus-70-years is too long, their amici argue that the last 20 years of protection do not, when discounted to present value, provide a significant portion of the total return. Congress considered that claim, however, and found it unpersuasive. See S. Rep. No. 315, *supra*, at 12. Shorter terms discriminate against serious works of authorship, whose value is often discovered only long after they are written and initially published. *Ibid.* The longer term enhances the present value of all works, since purchasers (*e.g.*, publishers) cannot predict which will be successful, much less which will be successful after a long delay. Amici's argument also ignores that authors (particularly later in life) have an incentive to establish a longer income stream to help support not only themselves, but children and grandchildren. Landes & Posner, *supra*, at 363 (noting that "bequest motives" can affect "people's decisions to work, save," and thus to create); S. Rep. No. 315, *supra*, at 11 ("One of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and grandchildren."). The Berne Convention copyright term is premised on the strength of that desire. See p. 25 & n.16, *supra*. James Madison himself exemplified both concerns. He provided for posthumous publication of his works in part because "antiquity" would give them a more "attractive character," and in part because he wanted to provide income to "his much younger wife, for whose support and comfort, he worried." See D. McCoy, *The Last of the Fathers* 164-165 (1989).

Petitioners are also incorrect to argue that upholding the CTEA would authorize a perpetual copyright through overlapping term extensions. Pet. Br. 13-14, 19. As an initial matter, Congress's traditional authority to extend copyright terms for both subsisting and future works enables Congress to select *shorter terms* in the first instance (as it did in 1831, 1909, and 1976), since those shorter terms can be replaced if they prove inadequate. More fundamentally, petitioners are mistaken in urging that the "limited Times" requirement can have "meaningful content" only if the Court—by modifying constitutional text and repudiating historical practice—creates a "line between *prospective* and *retroactive* extensions." *Id.* at 14. If Congress ever did adopt a term that was too long to be "limited," such an effort would be unconstitutional whether enacted in one statute or a series, and this Court surely could distinguish that term from the limited time protected under the CTEA.[18] Conversely, any statutory copyright term that qualifies as "limited" with respect to future works—regardless of its legislative evolution—is also "limited" with respect to existing ones. The Constitution bars perpetual copyrights, but it does not bar a

[18] Since, as we have described in detail, Congress rationally relied on traditional copyright considerations in establishing the CTEA's *limited* copyright term, petitioners' reliance (Br. 9, 11, 12, 19) on the concept of "outer limits" from *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), is wholly misplaced in this case. Moreover, *Lopez* and *Morrison* involved the boundaries between state and federal regulatory authority, not an attempt (like petitioners') to immunize conduct from the possibility of *any* government regulation. We note further that the anticipated average 95-year duration of copyrights under the life-plus-70-year standard resembles some other long-accepted durational practices in the law, such as 99-year leases of real property and bequests within the rule against perpetuities. See 6 *American Law of Property* § 24.16, at 51 (1952).

limited term, such as the life-plus-70-year standard, merely because it was established in two steps rather than one.

E. Applying The CTEA To Existing Works Is A Necessary And Proper Exercise Of Congress's Power

This Court has long recognized that a grant of power in Article I of the Constitution permits Congress to enact not only legislation that is "indispensably necessary" to the exercise of its enumerated powers, but also such provisions as Congress rationally deems "necessary and proper," U.S. Const. Art. I, § 8, Cl. 18, "convenient, or useful" thereto, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 354, 413, 421 (1819). As this Court has pointedly explained:

> [The] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to "secur[e] for limited Times to Authors * * * the exclusive Right to their respective Writings." * * * [I]t is not our role to alter the delicate balance Congress has labored to achieve.

Stewart v. *Abend*, 495 U.S. 207, 230 (1990); see *Sony Corp.*, 446 U.S. at 429 ("[I]t is Congress that has been assigned the task of defining the scope of the limited [rights] that should be granted authors or inventors in order to give the public appropriate access to their work product."); *Pennock* v. *Dialogue*, 27 U.S. 1, 17 (1829) (similar). "[If] the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to * * * tread upon legislative ground." *James Everard's Breweries* v. *Day*, 265 U.S. 545, 559 (1924); *The Legal Tender Cases*, 110 U.S. 421, 440 (1884).

Ignoring those decisions, petitioners advocate the application of "heightened scrutiny," by requiring "that any extensions be 'congruent and proportional' to proper Copyright Clause ends." Pet. Br. 31-32. Petitioners never requested congruence and proportionality review below. To the contrary, they conceded that it was only the "rare case where

Congress's judgment cannot stand." Pet. C.A. Br. 30. Petitioners also provide no basis for overruling the deferential standards established in *Abend* and *M'Culloch*. Instead, they rely on *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000), which concerned Section Five of the Fourteenth Amendment, not Article I of the Constitution. Those cases employed "congruence and proportionality" review because Congress lacks authority under Section 5 to "decree the substance" or "define" the rights at issue; it has authority only to "enforce by appropriate legislation" the substantive rights created by the Constitution itself. *City of Boerne*, 521 U.S. at 519.[19] By contrast, the Copyright Clause *does* grant Congress authority to define the scope of the substantive rights. Under the Constitution, "it is Congress that has been assigned the task of *defining* the scope of [rights] that should be granted to authors or inventors." *Sony Corp.*, 464 U.S. at 429 (emphasis added). Moreover, *Kimel* and *City of Boerne* implicated federalism and separation of powers concerns not present here.

Petitioners in any event do not argue that the Copyright Clause requires courts to evaluate every jot and tittle of each copyright enactment under heightened scrutiny to determine its effect on "progress." Instead, they urge this Court to find that applying a new copyright term to an existing work categorically and necessarily fails to promote

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[19] The Court has recognized that Congress, in enforcing the Fourteenth Amendment, may enact laws that sweep somewhat more broadly than the Fourteenth Amendment itself "[to] prevent unconstitutional actions." *City of Boerne*, 521 U.S. at 519. Absent review for "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," however, such remedial legislation could "become substantive in operation and effect," and could thereby expand the definition of constitutional rights rather than merely prevent the violation of such rights. *Id.* at 519-520. No comparable concerns arise in the copyright context.

progress.[20] Any such finding would be demonstrably incorrect.

1. *Congress's Longstanding Practice Of Providing Authors With The Benefit Of Subsequent Enactments Enhances Fairness And Incentives*

Congress has, since 1790, applied newly enacted copyright terms to future and subsisting works on an evenhanded basis. See pp. 8, 12-13, *supra*. As Representative Huntington declared in 1831, "justice, policy, and equity alike forb[id]" that an "author who had sold his [work] a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of [the] act." 7 Cong. Deb. 424 (1831). That longstanding effort to ensure equitable operation of copyright law is itself sufficient to sustain the legislation as "necessary and proper," since the Constitution does not bar Congress from seeking to ensure that its enactments are substantively fair. Interests in efficient legal administration similarly support that result. Nothing in the Copyright Clause compels Congress to create a potentially unwieldy, two-tiered copyright system that grants works created the moment before a statutory amendment a term different from that applied to works created the moment after. Petitioners concede (Br. 28-30) that those important concerns were permissible justifications for the 1790 Act. They are likewise permissible justifications today.

Petitioners, moreover, err in arguing that Congress's treatment of authors of existing works does not affect incentives to create future works. To be sure, Congress cannot establish an incentive to create a work that already

[20] Petitioners' theory would also appear to preclude Congress from expanding the bundle of exclusive rights with respect to existing works, something Congress frequently has done. See 18 Cardozo Arts & Ent. L.J. at 704 (Prof. Ginsburg). See, *e.g.*, Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212 (granting exclusive rights to dramatize and translate); Act of Mar. 4, 1909, ch. 320, § 1(b), (d) and (e), 35 Stat. 1075-1076 (adaptations and public performances). See also p. 20, *supra*.

exists. But Congress's treatment of authors who have already created undoubtedly affects the incentive for those authors and others to undertake future creations. For example, Congress's longstanding practice of giving authors with existing works the fair benefit of intervening legal changes —and altering copyright terms and the scope of protection for already created works in response to technological, demographic, and economic changes to ensure what Congress deems a "fair" return—enhances the value of the proffered reward.

That is true because, among other things, authors have a greater incentive to create new works where the government has a reputation for ensuring appropriate compensation and equitable results. As Professor Eisenberg has explained in an analogous context, "even a party who feels no moral need to deal fairly may agree to an appropriate modification" to an existing bargain "because he wants to develop or maintain a reputation for fair dealing, so that others will be more ready to contract with him." See M. Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. Rev. 1005, 1040 (1998).[21] Petitioners, moreover, cannot deny that Congress would promote progress if it included, as an *ex ante* inducement, in every copyright statute an express guarantee that authors would receive the benefit of any later legislative enhancements to the scope of

[21] See E. Zajac, *The Political Economy of Fairness* 101 (1995); R. Posner, *An Economic Analysis of Law* 373 (5th ed. 1998) (explaining that one without a "reputation for fair dealing" would "have to pay * * * higher wages"); B. Black & R. Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 Harv. L. Rev. 1911, 1940 (1996); A. Meese, *Regulation of Franchisor Opportunism and Production of the Institutional Framework*, 23 Harv. J.L. & Pub. Pol'y 61, 68 (1999) (if "reputation for fair dealing deteriorates," that "reduc[es] the price" an entity "can command"); L. Bernstein, *Private Commercial Law in the Cotton Industry*, 99 Mich. L. Rev. 1724, 1748 (2001) (explaining that "reputation" is often "reflected in the selection of transactional partners as well as in the transaction price").

copyrights.[22] Nothing in the Constitution bars Congress from establishing the same incentive by adopting the same approach as a matter of unbroken practice. See pp. 1-3, 8, 13, *supra*. Even if the wisdom of that approach were debatable, Congress "may implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Graham*, 383 U.S. at 6.

In *United States* v. *Hall*, 98 U.S. 343 (1878), this Court applied similar logic in interpreting Congress's power "to * * * raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the land and naval forces." In examining Congress's authority to offer "[b]ounties * * * to promote enlistments, and pensions to the wounded and disabled * * * as like inducements," the Court held that "*[p]ast services may also be compensated*," and that pensions could be "granted to those who were wounded, disabled, or otherwise rendered invalids * * * *even in cases where no prior promise was made or antecedent inducement held out.*" *Id.* at 351 (emphasis added). Under petitioners' theory, such compensation would be impermissible because the government cannot "raise the army" or "provide for or maintain a navy" by rewarding one who has already served and (being disabled) is unlikely to serve again. But this Court held that such post-performance benefits are "necessary and proper" to exercising that enumerated power, see *ibid.*, indicating both that treating former service members fairly is itself a necessary and proper exercise of congressional authority, and that such treatment helps recruitment by showing potential future service members that they will be treated equitably regardless of when their contribution occurs.

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[22] Indeed, it is well established that such "most favored nation" rights increase the value of the offered bargain. W. Schwartz & A. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation*, 16 Int'l Rev. L. & Econ. 27, 29 (1996).

Similar fairness concerns are especially pertinent with respect to the CTEA, because Congress found that the prior copyright term had failed "to keep pace with the substantially increased commercial lives of copyrighted works resulting from the rapid growth in communications media," so that copyright holders typically received a smaller fraction of their works' total value. O. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. Pitt. L. Rev. 719, 728 (1998).[23] Such effects were exacerbated by increased human longevity, delayed childbirth, and increased piracy, all of which contributed to the likelihood that an author's revenues from his creative works were less likely to support his (younger) heirs during their (longer) lifetimes, even though the overall social value of the author's works had increased.[24] Particularly in light of Congress's "constitutional authority and institutional ability to accommodate fully the varied permutations of competing interests," *Sony*, 464 U.S. at 431, the legislative judgment that the CTEA fairly compensates authors of future and existing works, and that the historical pattern of such fair treatment enhances incentives for future creativity, warrants substantial deference.

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[23] See, *e.g.*, *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. 86 (1997) (*1997 Hearing*) (statement of George David Weiss, President, Songwriters Guild of America).

[24] Experience under the 1976 Act convinced Congress that the pre-CTEA term did not adequately secure "the right to profit from licensing one's work during one's lifetime and to take pride and comfort in knowing that one's children—and perhaps their children—might also benefit from one's posthumous popularity." 141 Cong. Rec. 6553 (1995) (statement of Sen. Feinstein). Changes in "[h]uman longevity" were "increasingly undermining this fundamental precept of copyright law." *Ibid.*; see 144 Cong. Rec. S12,377-S12,378 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch). See also pp. 25-26 & n.16, *supra*.

2. *The CTEA's Application To Existing Works Increases Incentives For Copyright Holders To Restore And Disseminate Their Works*

Applying the CTEA's copyright term to subsisting copyrights also enhances the incentive for copyright holders "to restore older works and further disseminate them to the public." H.R. Rep. No. 452, 105th Cong., 2d Sess. 4 (1998); S. Rep. No. 315, *supra*, at 13. Recent technologies produce new opportunities for such efforts:

> Until now, copyrighted works have been fixed in perishable media, such as records, film, audiotape, paper or canvas. * * * The digital revolution offers a solution to the difficulties of film, video and audio preservation, and offers exciting possibilities for storage and dissemination of other types of works as well.

Ibid. Granting a longer term for existing works creates greater incentives for copyright holders to digitize, distribute, restore, or otherwise exploit those works. See Pet. App. 27a; see also *id.* at 12a-13a; H.R. Rep. No. 452, *supra*, at 4; S. Rep. No. 315, *supra*, at 13. Absent such exclusive rights, few could risk a substantial commercial investment in restoration because, after they sold a single copy, the work could be digitally reproduced and redistributed globally by others who had made no such investment. S. Rep. No. 473, 94th Cong., 1st Sess. 117 (1975) (noting that "lack of copyright protection" can "restrain[] dissemination of a work, since publishers and other users cannot risk investing" absent copyright).[25]

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[25] See 141 Cong. Rec. 6555 (1995); *The Copyright Term Extension Act of 1995: Hearing on S. 483, Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 42 (1995) (*1995 Senate Hearing*) (statement of Jack Valenti) ("Whatever work is not owned is a work that no one protects and preserve[s]. * * * There is no one who will invest the funds for enhancement because there is no longer an incentive to rehabilitate and preserve something that anyone can offer for sale."); *1997 Hearing* 47 (statement of Fritz Attaway, Senior Vice President, Government Relations, Motion Picture Association of America) ("[C]opyright holders are given the incentive not only to create works, but they also are given an incentive to continue to distribute them and keep them in circulation").

Insofar as petitioners assert that restoration does not promote progress, they are mistaken. Without restoration, many works would be lost forever. Restoring those works to a usable form and disseminating them publicly promotes progress by exposing the public to expression that might otherwise be lost or remain secret. See *Sony*, 464 U.S. at 431-432 (describing the ultimate goal of copyright as "promoting *broad public availability* of literature, music, and the other arts") (quoting *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975) (emphasis added)). Here, Congress reasonably determined that a longer limited period of copyright would encourage holders of many older copyrights to invest the substantial sums necessary to restore and distribute them. That judgment is not only rational, but has proved correct. As amicus MPAA points out (Br. 15-20, 23-24), the film industry has responded to the CTEA by investing substantial sums in the restoration and dissemination of works that would otherwise never reappear in usable form.

Although petitioners profess concern that works with "old and untraceable copyrights" may not be restored or disseminated unless they fall into the public domain, Pet. Br. 44-45, such concerns are overstated and should not invalidate Congress's judgment. Congress concluded that "most material which is considered to be of continuing or potential commercial value" is never so abandoned, and that many abandoned works are "of practically no value to anyone." H.R. Rep. No. 1476, *supra*, at 136. By extending copyright terms, Congress permissibly focused on protecting the relatively few works that retain their long-term value, rather than the countless mass of works that lack such value. And Congress permissibly decided that, during the last twenty years of a work's CTEA copyright term, the established system of proprietary incentives would better serve

the public's interest in restoration and distribution than would the non-proprietary public domain, which affords little incentive to make substantial restoration and distribution investments. "[T]he advantage of the 'public domain' as a device for making works more available to the public is highly overrated; especially if availability is equated with 'low cost' to the public." *1995 Senate Hearings* 15-16 (quoting testimony of Irwin Karp). Accord *id.* at 41-42 (testimony of Jack Valenti) (noting that under actual marketplace conditions, public domain works do not circulate more widely or cheaply); *id.* at 218 (similar) (testimony of Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Bruce Lehman); 141 Cong. Rec. 6555 (1995) ("[T]here is very little evidence that the consumer really benefits economically from works falling into the public domain.") (Prof. Miller). Congress, moreover, has addressed the issue of orphaned works and the interests of historians, archivists, and other specialists, through 17 U.S.C. 108. Section 108(h) allows libraries, archives, and similar institutions to "reproduce" *and* "distribute, display, or perform in facsimile or digital form" copies of certain published works "during *the last 20 years* of any term of copyright * * * for purposes of preservation, scholarship, or research" if the work is not already being commercially exploited and further copies are not available at a reasonable price. 17 U.S.C. 108(h) (emphasis added). Congress has thus heard the concerns of petitioners and their amici. H.R. Rep. No. 1476, *supra*, at 136. Petitioners simply object to the balance Congress struck.

Ultimately, petitioners and their amici seek to show that Congress pursued bad public policy in assigning the last twenty years of CTEA's term to copyright holders and their licensees, rather than to public domain copyists like themselves. But such contentions are appropriately directed to Congress, as petitioners and their amici understood. *1995 Senate Hearing* 71-90 (statements of law professors); see also *id.* at 6-27, 40-42 (contrary views). Having failed to

convince Congress, see S. Rep. No. 315, *supra*, at 12 ("The Committee believes that the basic functions of copyright protection are best served by the accrual of the benefits of increased commercial life to the creator."), petitioners seek to reopen the same debate in this Court.

3. *The CTEA's Impact On International Trade Promotes Progress In The United States*

Congress's decision to apply the life-plus-70-year term to subsisting copyrights is also supported by international trade concerns. In 1995, one of the United States' largest trading partners—the European Union—directed member nations to establish a copyright term of life-plus-70-years. 144 Cong. Rec. S12,377-S12,378 (daily ed. Oct. 12, 1998). All current members have complied, and additional countries seeking to join the European Union have followed suit. The Senate Judiciary Committee assessed those changes' impact:

> Uniformity of copyright laws is enormously important to facilitate the free flow of copyrighted works between markets and to ensure the greatest possible exploitation of the commercial value of these works in world markets for the benefit of U.S. copyright owners and their dependents. Indeed, in an age where the information superhighway offers widespread distribution of copyrighted works to almost anywhere in the world at limited costs, harmonization of copyright laws is imperative to the international protection of those works and to the assurance of their continued availability.

S. Rep. No. 315, *supra*, at 8.[26]

Consistent with the Berne Convention, the European Union has directed its members to apply "the rule of the

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[26] See also *1995 Senate Hearing* 20 ("The Copyright Office believes harmonization of the world's copyright laws is imperative if there is to be an orderly exploitation of copyrighted works," particularly given "the development of the global information infrastructure [that] makes it possible to transmit copyrighted works directly to individuals throughout the world.").

shorter term," under which protection for foreign (*e.g.*, United States) works is "not [to] exceed the term fixed in the country of origin of the work." P. Goldstein, *International Copyright* § 5.3, at 239 (2001) (*International Copyright*) (quoting Berne Conv. Art 7(8)). Consequently, if Congress had not altered the United States copyright term for subsisting works, American authors of such works would receive less protection in Europe than their European competitors. Congress acted permissibly in "securing," for a "limited Time[]," American authors' "Right to their respective Writings" in Europe on an equal basis with European authors.

By enhancing the rights of all American authors abroad, Congress also rendered the United States a more attractive place to create and publish in the first instance. Since European copyright evaluates a work's "country of origin" based on where the work is first published, authors have significant incentives to "select the place of first publication with an eye to the country that will provide the longest term of protection under" the Berne Convention's "comparison of terms," see *International Copyright* § 5.3, at 241, especially if that country may also adjust subsisting works' copyright terms to meet changed circumstances. By establishing parity for existing and future works' copyright terms, the CTEA promotes progress by bolstering authors' incentive to publish their works first in this country. Cf. 7 Cong. Deb. App. 119 (1830) (remarks of Rep. Ellsworth) (explaining that the 1831 Copyright Act attempted "to place authors in this country more nearly upon an equality with authors in other countries").

In enacting the CTEA, Congress also determined that significant revenues could be generated by providing equitable treatment for United States copyrights abroad, thereby stimulating the creation and production of new works in the United States:

> [E]xtended protection for existing works will provide added income with which to subsidize the creation of new works. This is particularly important in the case of corporate copyright owners, such as motion picture studios and publishers, who rely on the income from enduring works to finance the production of marginal works and those involving greater risks (i.e., works by young or emerging authors).

S. Rep. No. 315, *supra*, at 12-13. See also *1997 Hearing* 90; *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 104th Cong., 1st Sess. 671-672 (1995) (statement of Lisa M. Brownlee). While petitioners' amici contend that increasing income of existing copyright holders (particularly institutional ones) will not spur them to invest in additional creative endeavors, in fact investment within an industry strongly correlates with current income. See O. LaMont, *Cashflow & Investment: Evidence From Internal Capital Markets*, 52 J. Fin. 83, 84, 105-106 (1997) (noting strong correlation, and confirming causative relationship in industry under review). That empirical controversy is for the legislature, not the judiciary, to resolve. And Congress's decision to match certain international copyright standards lies fully within Congress's constitutional authority. See *Sony*, 464 U.S. at 429; *Aiken*, 422 U.S. at 156; *Goldstein* v. *California*, 412 U.S. 546, 555 (1973).

II. THE CTEA IS CONSISTENT WITH THE FIRST AMENDMENT

Petitioners also assert that Congress's 210-year-old practice of applying new copyright terms evenhandedly to subsisting and future works offends the First Amendment. That claim cannot be reconciled with this Court's decision in *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), which concluded that copyright protection—

even as applied to works of great public and political importance—is consistent with the First Amendment.

A. The CTEA Survives First Amendment Scrutiny Consistent With *Harper & Row*

In *Harper & Row*, a magazine published verbatim excerpts of President Ford's not-yet published autobiography in violation of Harper & Row's copyright. Defending against an infringement action, the magazine argued that "First Amendment values required" the Court to permit the excerpts' publication. *Harper & Row*, 471 U.S. at 555-556. Rejecting that argument, the Court held that free speech safeguards within the copyright system sufficiently protect First Amendment interests and render further judicial intervention unnecessary. The Court explained that, because copyright laws protect only the author's particular expression, they do not interfere with the free communication of facts or ideas. 471 U.S. at 556. The Court also observed that copyright law protects First Amendment interests through the "fair use" doctrine, which allows public use of an author's copyrighted expression "in a reasonable manner without his consent." 471 U.S. at 550; see 17 U.S.C. 107.

"In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use," the Court concluded that the First Amendment does not require further restrictions on copyright protection. 471 U.S. at 560. *Harper & Row* thus teaches that the First Amendment impact of copyright restrictions is exceedingly modest, since such restrictions mainly bar commercial competitors only from exploiting an author's own creative expression.

Since *Harper & Row* was decided, courts have generously applied the idea/expression dichotomy, the fair use doctrine, and related rules to safeguard First Amendment values. Consistent with those doctrines, the public may copy

copyrighted forms of expression where "necessary to adequately convey the facts" or where the expression is "so integral to the idea expressed as to be inseparable from it." *Harper & Row*, 471 U.S. at 563. "When there is essentially only one way to express an idea, the idea and its expression are inseparable and copyright is no bar to copying that expression." *Yankee Candle Co.* v. *Bridgewater Candle Co.*, 259 F.3d 25, 35-36 (1st Cir. 2001).[27] And, consistent with this Court's decision in *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-582 (1994), courts have held that fair use protects a critic's appropriation of otherwise "protected elements of an original work of authorship to communicate her criticism" of the original work "without infringing the copyright." *Suntrust Bank* v. *Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001); *id.* at 1269-1276 (finding "Wind Done Gone" a permissible fair use parody of "Gone With The Wind," despite appropriation of significant original elements). See also P. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1135-1136 (1990) (Fair use should not be an "occasionally tolerated departure" from copyright but "a necessary part of the overall design" which "stimulat[es] productive thought and public instruction without excessively diminishing the incentives for creativity.").

Here, no less than in *Harper & Row*, those safeguards ensure that copyright contributes to rather than detracts from free debate. The CTEA does not bar the appropriation of facts and ideas within copyrighted works, nor does it limit the scope of fair use. Congress, moreover, has established additional exceptions during the 20 years added by the CTEA's copyright term. See 17 U.S.C. 108(h); p. 36, *supra*. Thus, while petitioners are undoubtedly correct that copyright law would not be "immune" from First Amendment attack if Congress "eliminate[d] the idea/expression distinc-

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[27] Accord *Ets Hokin* v. *Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000); *Veeck* v. *Southern Bldg. Code Cong. Int'l, Inc.*, No. 99-40632, 2002 WL 1270117, at *8-*9 (5th Cir. June 7, 2002) (en banc).

tion," "constrict[ed] the scope of fair use" beyond traditional boundaries, or established viewpoint or content discriminatory standards, Pet. Br. 35, *Harper & Row* establishes that First Amendment concerns are amply protected by copyright law where, as here, Congress has done none of those things.

Petitioners seek to distinguish *Harper & Row* by claiming that it "establish[es] a presumption against the need to engage in a First Amendment analysis every time a *copyright owner seeks to enforce his copyright* against an infringer," but does not govern "whether a copyright law has permissibly struck the balance between copyright and free speech at the outset." Pet. Br. 35, 36 (emphasis added). That distinction is "illusory." Pet. App. 6a-7a. Precisely the same legal question—whether the CTEA strikes a balance that is consistent with the First Amendment—can arise either in an abstract facial challenge like petitioners', or in a concrete dispute where a "copyright owner enforces his" CTEA-granted "copyright against an infringer," and the infringer challenges the CTEA's validity by way of defense. The question in both contexts is whether the First Amendment guarantees a right to exploit statutorily protected expression during the term specified by law.

Alternatively, petitioners attack *Harper & Row*'s reliance on the idea/expression dichotomy and fair use doctrines, arguing that they are "irrelevant to the First Amendment interests protected by limitations on the duration of copyright." Pet. Br. 36.[28] But petitioners cannot explain why they lack any First Amendment right to exploit a work on the last day of its original term, yet such rights suddenly appear on the first day of an extended term. In fact, petitioners' efforts to distinguish *Harper & Row* derive solely from, and add nothing to, their arguments concerning Congress's power under the Copyright Clause. And petitioners cannot show that the First Amendment was intended to allow unrestricted use of copyrighted expressions *before* they enter the public domain, *i.e.*, before expiration of the "limited Time[]" prescribed by Congress. Thus, if petitioners' interpretation of the Copyright Clause is rejected, their First Amendment claim must fail as well. Besides, the infringers in *Harper & Row* asserted a similarly time-sensitive right to publish an author's protected work, asserting that "First Amendment values" favored public dissemination of such expression "as soon as possible." *Harper & Row*, 471 U.S. at 556-557. This Court rejected that claim, holding that copyright accords authors the right to decide when to publish and that such rights are fully consistent with the First Amendment. *Id.* at 559-560.

Nor are petitioners correct in suggesting (Br. 36) that a "substantial content-neutral interest[]" was required in *Harper & Row*. *Harper & Row*, like many of the Court's cases, does recognize that copyright law as a whole encourages free expression, *Harper & Row*, 471 U.S. at 558. But this Court has never applied intermediate scrutiny to require that each provision of copyright law promote free expression. See pp. 45-47 & n.29, *infra*. Indeed, even though a broader fair use exception would have accelerated the dissemination of President Ford's autobiographical comments, *Harper & Row* held that the "the First Amendment protections already embodied in the Copyright Act[]" sufficiently preserved First Amendment values. 471 U.S. at 560. Those protections support the same conclusion here.

B. The CTEA Does Not Impermissibly Restrict Speech

Although the CTEA removes no works from the public domain, petitioners fault it because longer copyright terms reduce the rate at which copyrightable original expressions (but not ideas or facts) enter the public domain. Pet. Br. 37-

[28] To the extent petitioners suggest that "fair use" applies *only* to non-commercial uses (Br. 36), they are incorrect. Whether a work is commercial or non-commercial is only a single (and often unimportant) factor in determining whether a use is "fair." *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 583-584 (1994).

39. As a general matter, copyright promotes rather than inhibits free speech and public access to facts and ideas. *Harper & Row*, 471 U.S. at 558; *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 526-527 (1994). The copyright term established by the CTEA has that effect as well. By continuing Congress's longstanding policies of "fair treatment" and ensuring "fair returns," the CTEA seeks to preserve an environment that encourages the creation of new works. See pp. 30-33, *supra*. Moreover, the Act prompts copyright holders and their licensees to undertake constitutionally significant restoration, distribution, and derivative exploitation of existing works. See pp. 34-37, *supra*. The facts and ideas contained in all of those creations, whether original or derivative, fall immediately into the public domain; indeed, even otherwise protected expression is immediately subject to fair use comment, criticism, and review. See pp. 40-41, *supra*; *Harper & Row*, 471 U.S. at 558 ("[T]he Framers intended *copyright itself* to be the engine of free expression. By establishing a marketable right to * * * one's expression, copyright supplies the economic incentive to create and *disseminate ideas*.") (emphasis added).

Moreover, rather than granting windfall benefits, Pet. Br. 23, 41-42, the CTEA allows copyright holders an opportunity to profit from their creative property *to the extent* that they succeed in making the works publicly available. Absent some distribution effort, no return can be garnered. That is significant, since copyright law serves the public interest not merely by promoting creativity, but also by encouraging copyright holders to publish and disseminate works (and the ideas and facts therein) and thereby contribute to public discourse. See pp. 34-35, *supra*.

Finally, petitioners misstate the CTEA's effect on public access to knowledge. Pet. Br. 7, 46. Knowledge itself is free; only exploitation of proprietary expression is temporarily restricted. Indeed, notwithstanding the CTEA's term, the public has never before possessed such ready and affordable access to so much information as it does today. Far from

depleting that cultural reservoir, Congress believed that the CTEA would enhance and promote it, by giving authors and copyright holders an incentive to distribute their works (or to license others to do so) by all viable means, commercial or otherwise, including the Internet and other digital technologies touted by petitioners and their amici. See also *Stewart*, 495 U.S. at 229 ("[P]etitioners' true complaint is that they will have to pay more for the use of works they have employed in creating their own works. But such a result was contemplated by Congress and is consistent with the goals of the Copyright Act.").

Moreover, while petitioners and their amici profess concern that certain "orphaned" works may not be exploited or restored by copyright owners during the CTEA's term, Pet. Br. 44-45; Hal Roach Studios Br. 11-17; pp. 35-36, *supra*, petitioners cannot guarantee that, absent the CTEA, they would make any significant number of such works—which lack any "workable market" or sizeable public demand, Hal Roach Br. 20—available where copyright holders will not. Nor do they show that such works are more valuable than the works copyright holders will now restore and distribute because of the CTEA. In any event, Congress offered a special exception for such orphaned works during the last 20 years of the CTEA's copyright term, see p. 36, *supra*, and any further special exception also must be sought from Congress. See *Stewart*, 495 U.S. at 228 (rejecting argument that "many fewer works [would reach] the public," because such grievances "are better addressed by Congress").

C. Petitioners' Novel Request For Intermediate Scrutiny Should Be Rejected

Petitioners cite no copyright decision that has ever rejected the analysis employed in *Harper & Row*, or that has invalidated a copyright enactment by employing intermediate scrutiny. Nonetheless, petitioners urge the Court to invalidate the CTEA by applying intermediate scrutiny similar to that in *Turner Broadcasting System, Inc.* v. *FCC*,

512 U.S. 622, 662 (1994) (*Turner I*), and its progeny, cases that involve entirely different considerations. The statute at issue in *Turner I* required cable operators to carry and transmit broadcast stations through the cable operators' proprietary cable systems. Such must-carry provisions, the Court explained, implicate "the heart of the First Amendment," namely, "the principles that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Id.* at 642. Those provisions, moreover, "impose[d] special obligations upon cable operators and * * * cable programmers" beyond the obligations placed on all others. *Id.* at 641.

The CTEA and copyright law, by contrast, do not force anyone to reproduce potentially disagreeable expression, and they apply across the board to all who would exploit others' protected expression. Thus, while petitioners assert that there are free speech interests on both sides of this case, Pet. Br. 37, petitioners' "speech" interests hardly compare to those in *Turner*. Petitioners do not seek to avoid compelled speech, to vindicate the expression of particular viewpoints or ideas (which copyright law places in the public domain), or to protect the fair use of protected expression for comment and debate (which copyright law also protects). Instead, petitioners assert a novel constitutional right to exploit others' creative expression indiscriminately during the proprietary exclusive term established by Congress.

Moreover, by requesting intermediate scrutiny, petitioners appear to advocate an unprecedented and virtually limitless "need for First Amendment inquiry into whether" each and every feature of "copyright law has permissibly struck the balance between copyright and free speech at the outset." Pet. Br. 36-37. Petitioners thus propose, as examples of laws that must be "tested under" intermediate scrutiny, Congress's prohibition against "copying" works as well as "publishing" them; statutory rights to produce "derivative" works that include protected expression from an original work; and the application of copyright law to the

Internet. *Id.* at 38-39. Petitioners also seem to contemplate judicial balkanization of copyright terms according to the type of work at issue, subjecting the term for each type of work—whether it be film, book, or computer program—to heightened judicial review to ensure that it strikes the proper balance. *Id.* at 46-47. Despite petitioners' claim that deciding whether a prospective term of "50 years is enough, or 70 years is too much, is not a judgment meet for this Court" under the Copyright Clause, Pet. Br. 14, petitioners seem to argue that federal courts must make precisely those determinations under the First Amendment, and for each category of work. *Id.* at 40 n.14 (requesting "remand for an evidentiary hearing under the *Turner* standard on the prospective extension"); *id.* at 46 (proposing a distinction between film and other works). Indeed, although petitioners purport to identify distinct "First Amendment interests raised by copyright's duration," *id.* at 36, the putative interests correlate to the *length* and *scope* of copyright protection, not to whether the term is applied to a preexisting or future work.[29]

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[29] Petitioners' theory thus would draw into question virtually every expansion of rights, covered works, or copyright terms that Congress has ever enacted in response to changing technology and circumstances, including the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336, insofar as it grants a digital performance right to copyright owners of already existing and future sound recordings, and insofar as it constrains the ability of third parties to perform those works publicly; the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 2, 113 Stat. 1774, which increases the limits on statutory damages for infringement of existing and future works; and the other innumerable expansions Congress has enacted over the past two centuries. See p. 30 n.20, *supra* (other examples). As Professor Smolla has observed, it "would be both impertinent and impractical to superimpose an omnibus 'strict scrutiny' standard on the complex statutory schemes characteristic of intellectual property law. * * * The Supreme Court has never held, or even *intimated*, that Congress is subject to [such] searching superintendence * * * for every difficult policy choice it makes * * * . To the contrary, all of our intellectual property jurisprudence suggests that the accommodation

The Constitution textually entrusts the selection of "limited Times" to the political branches in the first instance. So long as the selected durations comport with the requirement of being "limited," there is no basis for courts to second-guess Congress's determinations under a heightened standard of review.[30] Indeed, acceptance of petitioners' novel standard could destabilize current copyright law—undermining the incentives that copyright is supposed to create—by threatening to invalidate heretofore unquestioned rights. Petitioners fail to make a sufficient case for so profoundly disrupting the existing legal framework by abandoning this Court's considered approach in *Harper & Row*.[31]

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between freedom of expression and protection of intellectual property is effectuated *in gross*, through the large structural elements of intellectual property that serve the function of mediating between ownership in expression and free trade in expression." R. Smolla, *Information As Contraband*, 96 Nw. U. L. Rev. 1099, 1157 (2002).

[30] Even if this Court were to apply some form of "intermediate scrutiny," the CTEA would survive such scrutiny. Indeed, in *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522 (1987), this Court upheld the U.S. Olympic Committee's (non-copyright, unlimited time) authority to prohibit certain uses of the term "Olympic." Restrictions on the "manner" in which the petitioner sought to "convey its message," the Court explained, were justified by the government's interest in "ensur[ing] that the USOC receives the benefit of its own efforts," and in generally promoting the participation of amateur athletes in the Olympic Games. *Id.* at 537.

[31] Petitioners also argue that, if the Court holds the CTEA's application to subsisting copyrights unconstitutional, it should strike down the extension for future works as inseverable. Pet. Br. 48-50. The court of appeals did not consider severability, and there is no reason for this Court to address that statute-specific issue—which focuses on congressional intent—in the first instance. See, *e.g.*, *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). In any event, there is no indication in the legislative history that Congress would have wanted the prospective extension of the CTEA to be invalidated if the Court declined to sustain the separate and independent provisions extending the term of subsisting works. To the contrary, Congress's reasons for the term extension (parity with the European Union's term; adjusting for increased piracy and life spans; and promoting progress generally) apply with separate (and by petitioners' claims, greater) force to the extension for future works.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

In 1998, Congress made a choice about who would have the right to develop and exploit 75 years of American culture. After extensive lobbying by the current owners of copyrighted works constituting an important part of this culture—including the heirs of some of America's most famous artists, as well as major media corporations—Congress chose these owners over the public at large.

Congress did not narrow its grant to works currently commercially exploited (at most 2% of the work copyrighted during the first twenty years of this period). Pet. Br. 7. It did not condition its grant upon the restoration of decaying work, or upon the dissemination of any work in any manner whatsoever. Instead, Congress simply created millions of new "exclusive Right[s]"—monopolies on the right to speak—with nothing more than a wish that the owners of these rights would exploit them in the ways Congress desired.

The essence of the government's argument in this case is that this massive redistribution of rights over popular and scientific culture gets the same level of review under our Constitution as milk subsidies, or OSHA regulations. On the government's view, this Court must permit such reallocations of the right to speak—not just the right to "copy" speech, but to develop it, and distribute it free of legal regulation—so long as Congress can posit any hypothetical end that this regulation of speech might advance.

"We [should] pause to consider the implications of the government's arguments." *United States v. Lopez*, 514 U.S. 549, 564 (1995). Although the most carefully articulated clause in Article I, sec. 8, expressly requires that any "exclusive Right[s]" over speech be granted for "limited Times" only, Congress, on the government's view, remains perpetually free to choose whether and when these "exclusive Right[s]" will expire. The public domain thus becomes a matter of legislative grace. And though it is uncontested that the First Amendment must police any regulation of how Amicus AOL Time Warner speaks across its cable lines, *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994), on the view of the government, a choice by Congress to "transfer from ordi-

nary citizens to . . . [AOL] Time Warner" speech rights over a significant part of American culture gets a First Amendment free-pass. Richard Epstein, *Congress's Copyright Giveaway*, Wall St. J., Dec. 21, 1998, at A19. Because of the rise of the Internet and the expansion of copyright law, copyright regulation has never been more significant to the development of popular and scientific culture. But on the government's view, our Constitution is blind to this form of speech regulation. Congress has a perpetual right to determine who may use our culture freely, and who must license before they may speak.

This extraordinary conclusion has no support in the Constitution's text, or this Court's cases. Nor is it validated by the partial history that the government presents. Under both the Copyright Clause and the First Amendment, blanket retroactive reallocations of the right to speak and develop culture—to spread it, to adapt it, to extend it in ways different from the original author's desire—merit heightened review. Under any form of heightened review, CTEA fails.[1]

I. CTEA EXCEEDS CONGRESS'S COPYRIGHT CLAUSE POWER

The government's argument in this Court confirms Judge Sentelle's charge below: on its theory of the Copyright Clause, there is no "stopping point" to Congress's power to extend "limited" terms. Pet. App. 17a. So long as Congress specifies some term, the government maintains that any rational basis is enough to justify extending that term. Thus, while this Court has recog-

[1] Contrary to the claims of the Bureau of Nat'l Affairs, Br. at 5-13, this case is clearly justiciable. Petitioner Dover Publications had planned to republish a number of works copyrighted in 1923. J.A. 18-19. Because it would face civil liability under CTEA, and criminal liability under the NET Act, 17 U.S.C. § 506(a), Dover Publications has standing to sue the Attorney General to have CTEA declared unconstitutional. *See, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988); *see also Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 n.9 (1977) (one petitioner sufficient for justiciability). Moreover, contrary to BNA's assertions, prosecuting copyright violations is a high priority of the government. U.S. Dep't of Justice, Intellectual Property Cases, http://eldred.cc/g.

nized certain *implied per se* limits on the scope of the copyright and patent power,[2] the one clearly *express* limit in the Constitution's text, "limited Times," imposes but a trivial restriction on Congress's authority. On the government's theory, "[t]he Congress that can extend the protection of an existing work from 100 years to 120 years; can extend that protection from 120 years to 140; and from 140 to 200 . . . ." Pet. App. 18a. (Sentelle, J., dissenting). *Cf. Pennock v. Dialogue*, 27 U.S. 1, 19 (1829) (Story, J.) (creative work to enter public domain "at as early a period as possible"). Neither the Framers' text nor framing history justifies such a result.

A. History Does Not Validate CTEA

The core of the government's argument is that history sanctions CTEA: That a "consistent practice" since the founding demonstrates that the First Congress "unquestionably understood that [Congress] had authority to apply a new, more favorable term to existing works," Resp. Br. 8, 13—independent of any quid pro quo, and regardless of whether the new term "promote[s] ... Progress." Resp. Br. 9-19. There is no such "consistent practice" that validates CTEA.

1. The Act of 1790 Does Not Validate CTEA

The government argues that the First Congress not only "appl[ied] its new copyright term to subsisting works; it *extended* and *strengthened* legal protection (temporally and geographically) beyond that available when the authors created them." Resp. Br. 16. This claim ignores a crucial part of the framing history, and is demonstrably false.

As petitioners acknowledged, the 1790 Act granted protection to "subsisting works"—both published works and works created but not yet published. Copyright Act of May 31, 1790, 1 Stat. 124; Pet. Br. 29. Of these works, a *tiny* fraction was protected un-

[2] *See, e.g., Feist Publ'ns v. Rural Tele. Serv. Co.*, 499 U.S. 340, 346-47 (1991) (copyright limited to original works); *Graham v. John Deere Co.*, 383 U.S. 1, 4 (1966), citing *Hotchkiss v. Greenwood*, 52 U.S. (11 How.) 248 (1851) (patents limited to novel inventions); *Feist*, 499 U.S. at 350 (neither patent nor copyright may shrink public domain); *Graham*, 383 U.S. at 6 (same).

der state *statutory* copyright. *See* G. Thomas Tanselle, *Copyright Records and the Bibliographer*, 22 STUD. IN BIBLIOG. 77, 83-85 (1969) (counting 44 state copyrights from five states). For these works, the 1790 Act *may* have extended the term of protection.

The "may," however, points to the critical historical fact that the government simply omits. As petitioners also argued, at the time Congress passed the 1790 Act, there were many who believed that the *common law* protected "literary property," not only before publication but also after. Pet. Br. 28-29.[3] This common law right was perpetual. And thus for works protected by the common law (arguably many times the number protected by state statute[4]), the 1790 Act would have *reduced*, not "*extended*," the effective term of protection.

Which rule governed, or which rule governed more, was a matter of significant and continuing uncertainty at the time of the framing. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 660 (1834); 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 483 (1953). A work whose

[3] Madison declared the common law protected an author's copyright. THE FEDERALIST NO. 43, at 309 (B. Wright ed. 1961). He likely derived his understanding from Blackstone. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 406-07 n.h. (Robert Bell ed. 1771) (first American edition). Blackstone had defended his view in *Millar v. Taylor*; Lord Mansfield adopted it. 98 Eng. Rep. 201, 218, 228-29 (K.B. 1769). The House of Lords reversed later *Millar*. *Donaldson v. Beckett*, 4 Burr. 2408 (H.L. 1774) (Statute of Anne terminated common law right), but as the Statute of Anne did not apply in the colonies, there was still uncertainty about whether the common law in America allowed a perpetual right. *See* 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 477 (1953) ("the Common Law . . . was in a highly uncertain state[] on the subject of copyrights"); *see also Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (recognizing paralleling histories).

[4] The common law right would attach upon creation, while state rights required registration and often deposit. In any case, the number protected under state statutes was very small. As recent archival work confirms, of the 21,000 imprints recorded over the period from 1790 to 1800, there are records of just *12* works (fewer than .05%) copyrighted under the 1790 Act that had been published before 1790. Fewer than half of these were protected under state statutes. *See* William J. Maher, *Copyright Term, Retrospective Extension, and the Copyright Law of 1790 in Historical Context* 7-10 (2002), http://eldred.cc/m.

statutory copyright expired in one state might still be protected by the common law in another. Indeed, in some states, the statutory copyright expressly exempted any parallel common law rights. *Id.* (describing Connecticut.) Thus, a publisher, or author, could not know with certainty that a creative work was no longer subject to legal control, because no clear line divided the "public domain" from "literary property."

Against this background, one obvious purpose of the 1790 Act was to eliminate uncertainty by "extinguish[ing], by plain implication of 'the supreme Law of the Land,' *the perpetual rights which authors had, or were supposed by some to have, under the Common Law*." CROSSKEY, *supra* at 486 (emphasis added). A federal right would terminate any claim to perpetual protection, and thereby establish an effective public domain of works that could be spread across the nation at low cost.

The First Congress achieved this effect by offering "authors and proprietors" of existing works a bargain: *In exchange* for a new federal right, the author or proprietor would abandon his common law or state statutory right. This new federal right may or may not have been stronger than the right it replaced. That would depend upon how the common law was interpreted. Nor was it even certain that the common law and state statutory rights would survive the establishment of a federal regime.[5] But in the face of uncertainty, Congress responded in a way as old as the concept of bankruptcy: by liquidating uncertain common law and state claims *in exchange* for a clear, and new, federal right. *Wheaton*, 33 U.S. at 661.

The requirement of an exchange was built into the statute. Unlike the Statute of Anne, which simply granted rights to existing works as of a certain date, 8 Anne ch. 19 (1710), the 1790 Act required registration and deposit before any federal right vested. Act of 1790, Act of May 31, 1790, § 1, §§ 3-4. These requirements were conditions upon the federal right. *Wheaton*, 33 U.S. at

[5] *Compare* Resp. Br. 17 n.9 (citing Bugbee's claim that preemption is "dubious") *with* EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 469 (2002) (expectation of preemption "reasonable").

664-65. Performing them would manifest the abandonment of any other right. *Cf.* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 101 (1825) (England) ("the protection of a statute has been likewise extended, which at the same time disposed of the common law question, as to those who complied with its forms").

This exchange of a state or common law right for a new federal right plainly "promote[d] Progress." Uncertainty about any property right, but especially an intellectual property right, inhibits the use and development of that property. Clarifying such uncertainty, by effecting a transition between two legal regimes, would advance the aim of the Copyright Clause ("promote . . . Progress") through its enumerated means ("by securing [Rights] for limited Times"). The 1790 Act thus offered (1) "limited" terms (2) in exchange for (3) a progress-promoting act.

The government simply ignores this history. And by focusing attention upon an imprecision, the government creates a mirage of consistency across history when in fact there is none. By shifting between the claim that Congress has "consistently" extended the term of "subsisting works," Resp. Br. 1, 6, 8, 12, 16, 22, 23, 30, 38, and the claim that Congress has "consistently" extended the term of "subsisting copyrights," Resp. Br. 2, 3, 5, 9, 13, 23, 34, 37, the government obscures the critical difference between the 1790 Act and every later act. The 1790 Act offered copyrights to all "subsisting works." The 1831, 1909, and 1976 Acts *did not*. These statutes offered terms to "subsisting copyrights"—expressly excluding existing works in the public domain. *See* Act of Feb. 3, 1831, 4 Stat. 36, ch. 16, §§ 1, 16, 4 Stat. 436, 439; Act of March 4, 1909, § 7, 60 Pub. L. 349, 35 Stat. 1075, 1077; Act of 1976, § 303, Pub. L. No. 94-553, 90 Stat. 2541, 2573 (1976). The difference is fundamental: It acknowledges the transition the 1790 Act was to effect, and its role in crafting the public domain that subsequent acts took for granted. The 1790 Act is thus different in kind from the three copyright acts that followed it, and, as the chart in the Addendum demonstrates, different in detail.

CTEA too is fundamentally different from the 1790 Act. It does not offer "subsisting copyright" holders a (1) "limited" term. *See infra* § I.B. And it certainly does not offer that term (2) in exchange for (3) a progress-promoting act. The beneficiaries of CTEA need do nothing to receive its benefit; the gift is automatic. Nor does their receipt of this gift realize a progress-promoting act. Indeed, as economists Akerlof *et al.*, demonstrate, Br. at 13-14 ("anti-commons"), by extending rights indiscriminately, CTEA *increases* uncertainty over existing works, thereby inhibiting, rather than promoting, progress. *See Festo Co. v. Kabushiki,* 122 S. Ct. 1831, 1837 (2002) ("clarity is essential to promote progress . . . . A [rights] holder should know what he owns, *and the public should know what he does not.*") (emphasis added). Hundreds of thousands of new rights are created without any effective way to know who the present holders of these rights are. CTEA thus has *precisely the opposite effect* of the 1790 Act, through means that are fundamentally different. 1790 is no precedent for CTEA.

2. Subsequent Acts in Congress

Without the 1790 Act, the government has *no framing precedent* to contradict the plain meaning of the Copyright Clause. The three subsequent copyright acts that it relies upon are all far removed from "contemporaneous and weighty evidence of the Constitution's meaning." *Printz v. United States*, 521 U.S. 898, 905 (1997) (citations omitted). Indeed, none of the cases that the government cites gives any interpretive weight to congressional action two generations removed from the framing, as the 1831 Act is. Resp. Br. 11-12.

All three subsequent statutes are distinguishable from CTEA.[6] And even if they were not, there is no authority to suggest that

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[6] The government claims that the 1831 Act (like CTEA) "applied the new copyright term to newly created and subsisting works [sic] alike." Resp. Br. 1. It did not. It granted its benefits to works in their *initial* term only—meaning presumptively *to authors*. Act of February 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439. CTEA's benefit is presumptively to heirs. If, as the government argues, granting retroactive, unconditional "bonuses" to authors for work done in the past can inspire them to work harder in the future, Resp. Br. 30-33, then while the 1831 Act would violate petitioners' *per se* rule, it is conceivable that a proportionality standard would find the extension constitutional. It could not validate CTEA. The 1909 Act is not subject to any similar saving interpretation,

three statutes enacted over the course of 150 years suffice to alter the Constitution's meaning. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 566 n.19 (1976) ("neither long-standing congressional authorization nor widely prevailing practice justifies a constitutional violation").

Nor do early extensions of patents provide authority for the view that Congress may extend terms without regard to whether they "promote . . . Progress." The government characterizes these extensions as guided by "equi[ty]." Resp. Br. 13. But the "equity" of these early extensions was to assure that the patent holder got the benefit of his *original* bargain. Such individual, narrowly tailored term extensions—which were (1) never challenged in this Court on the basis of "limited Times,"[7] (2) almost universally based on some failing by the government leading to inadequate compensation,[8] and (3) directed to facilitating the further spread of the invention at stake—cannot support the blanket unconditional extension of CTEA. They each "promote. . . Progress" in a way that CTEA does not.[9]

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though obviously Congress's actions 120 years after the framing offer no insight into original meaning. In any case, the only extensions that could possibly be affected by a decision in the instant case are those effected by the 1976 Act. As the government points out, the 1976 Act, like the 1790 Act, offered its benefits *in exchange* for a similar (though not identical) termination of background common law rights. On the precedent of the 1790 Act, that may save the 1976 Act. In any case, for the reasons Amicus Association of American Publishers advance, Br. at 27-30, the "disruption" of applying petitioners' *per se* rule to the 1976 Act may well bring it within a narrow exception to retrospective application of new law suggested in *Ryder v. United States*, 515 U.S. 177, 185 (1995) and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761 (1995) (Kennedy, J., concurring).

[7] In *Evans v. Eaton*, 8 F. Cas. 846 (C.C.D. Pa. 1816) (No. 4,559), *rev'd*, 16 U.S. (3 Wheat.) 454 (1818), the extension was challenged on the basis of the Contracts Clause. In *Evans v. Jordan*, 8 F. Cas. 872, 874 (C.C.D. Va. 1813) (No. 4,564), *aff'd*, 13 U.S. (9 Cranch) 199 (1815), the only constitutional provision mentioned was the Ex Post Facto Clause. 13 U.S. (9 Cranch) at 200. Contemporary writers doubted whether the extension was constitutional. *See, e.g., Thompson v. Haight*, 23 F. Cas. 1040, 1047-48 (C.C.S.D.N.Y. 1826) (No. 13,957); WILLARD PHILLIPS, LAW OF PATENTS FOR INVENTIONS 370-71 (1837).

[8] Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution*, 49 J. COPYR. SOC'Y 19, 107-09 (2002). *See, e.g.,* AMERICAN STATE PAPERS, NO. 207, 1 MISC. 453 (1806) (though patent holder's plant destroyed by fire, no extension because no government error).

B. CTEA's Term Is Not "Limited"

The government charges petitioners with "proposing to convert [a] grant of power into a limitation." Resp. Br. 19. Petitioners concede this is their aim. But this conversion was recognized almost forty years ago. As the Constitution plainly states, and as this Court clearly affirmed in *Graham v. John Deere Co.,* 383 U.S. 1, 5 (1966), "[t]he clause is both a grant of power and a limitation." Indeed, the "grant of power" *is* a "limitation": as this Court stated, speaking of the "promote . . . Progress" clause, "[t]his is the standard expressed in the Constitution *and it may not be ignored*." *Id.* at 6 (emphasis added).

Yet "ignoring" the grant of power is precisely the government's strategy. Rather than reading the text of the Clause along with the "words and sentences with which it stands connected," *Wheaton,* 33 U.S. at 661, the government dismisses the grant of power as a mere "preamble," which, as the court below held, "constitutes [no] limit on congressional power." Pet. App. 10a. That permits the government to interpret "limited" abstracted from the rest of the Clause. So interpreted, a term is "limited" in the government's view even if another "limited term" can be added to it—or, as in CTEA's case, added to it twice.[10] This interpretation is without merit.

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[9] *McClurg v. Kingsland,* 42 U.S. (1 How.) 202 (1843), relied upon by the government, Resp. Br. 20, is not to the contrary. Despite the government's suggestion, *McClurg* did not involve a change in a patent *term.* The law at stake "authorized the issuing [sic] a new patent, when an original one was invalid by accident, inadvertence or mistake . . . ." 42 U.S. at 207. The power to enact that law arises from the "to secure" language in the Clause. As that language is not an express limitation on Congress's power, the fact that changes pursuant to it may apply retroactively would not say anything about retroactive changes of term—because, again, "[t]ime[]" is an express limitation in the Clause.

[10] The government argues that adding a "limited term" to a "limited term" does not render the term "unlimited," just as extending the time to file a brief does not render the time for filing a brief "unlimited." Resp. Br. 10. True. But the constitutional question is not whether a term is "unlimited"; the question is whether it is "limited." If a printer sells "limited edition prints," but reprints new copies

1. The Grant of Power Is Not a "Preamble"

On the basis of a treatise, the government asserts that the grant of power in the Copyright Clause is a mere "preamble" which has no effect on the interpretation of the Clause. Resp. Br. 18-19. This claim is incorrect.

As Judge Sentelle argued below, the grammatical structure of the Copyright Clause is both unique in Article I, sec. 8, and unambiguous: It grants Congress a particular power ("to promote the Progress of Science") which Congress is to pursue through specified means ("by securing for limited Times to Authors . . . exclusive Right to their . . . Writings . . ."). Pet. App. 18a-19a. Like every other power in Article I, sec. 8, "to promote the Progress of Science" is the direct object of "Congress has the power . . . ." Removing that object renders the clause meaningless: "Congress has the power … by securing for limited Times to Authors the exclusive Right to their Writings." *Accord* WALTERSCHEID, *supra,* at 160, 265; Lawrence B. Solum, *Congress's Power to Promote the Progress of Science*, 36 LOY. L.A. L. REV. __ (forthcoming 2002) (preamble interpretation "untenable"), http://eldred.cc/s. There is therefore no warrant, in grammar or authority, for ignoring constitutional text.

2. The Grant of Power Has Interpretive Effect

This Court has recognized limitations on the scope of Congress's Copyright and Patent Power which make sense in light of the grant of power. In *Feist Publ'ns v. Rural Tele. Serv. Co.,* 499 U.S. 340, 346-47 (1991), for example, this Court affirmed that copyright can only extend to works that are "original." In the same case, the Court reaffirmed that neither copyrights nor patents could extend to works in the public domain. *Id.* at 350 (copyrights); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 146 (1989), citing *Graham,* 383 U.S. at 6 (patents). As petitioners have argued, these *implied* limitations on the scope of the

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whenever customers so demand, the print runs might not be "unlimited" (as they depend upon new customers), but they would certainly not be "limited edition prints."

copyright and patent power make sense of the grant of power. On the government's theory, they are inexplicable.

The government claims, for example, that *Feist* drew its requirement that copyright extend to "original" works from the terms "Authors" and "Writings" alone. Resp. Br. 21. That is wrong. *Feist* simply repeated the standard set in the *Trade-Mark Cases,* 100 U.S. 82 (1879), and as this Court explained in a contemporaneous case, the *Trade-Mark Cases* drew their limit from the grant of power. *Higgins v. Keufel,* 140 U.S. 428, 431 (1891). It was because certain writings did not "promote the Progress of Science" that they were excluded from the reach of the copyright power. *Id.* (writing had "no possible influence upon science or the useful arts"). *Accord* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 435 (1985).

The same is true of this Court's restriction on copyright shrinking the public domain. The government responds to this argument by claiming that CTEA does not "remove *knowledge* from the public domain." Resp. Br. 22. That is true, but irrelevant. The question petitioners pose is *why* there is such a limitation on the scope of Congress's Copyright and Patent authority. To this, the government has no answer. Under its method for interpreting "limited Times"—which simply abstracts the term from the Clause and asks whether there is any plain meaning that could uphold Congress's power—there is no reason that Congress could not extend a copyright to an author or inventor whose work has entered the public domain. Indeed, this is precisely the government's claim in a parallel case. *See* Def. Mem. in Supp. Mot. to Dismiss at 22-24, *Golan v. Ashcroft*, D. Colo., No. 01-B-1854, http://eldred.cc/ga.

These implied limitations on Congress's power make sense when the words of the clause are interpreted in light of the "grant of power." They are *per se* restrictions that serve to assure that Congress only grants monopolies that "promote the Progress of Science and useful Arts." "[L]imited Times" should be interpreted in the same manner: Just as the "Authors" and "Writings" that are properly subject to the copyright power are those that "promote … Progress"—*i.e.*, those that are original, and not from the public domain—so too should the "limited Times" that are

authorized under the Copyright Clause be restricted to those that "promote . . . Progress"—*i.e.*, those that grant a term *in exchange for* something new. Pet. Br. 16-17. By granting a blanket, retroactive extension in exchange for nothing new—not for restoring old works, or disseminating old works, or for any other progress-promoting activity—CTEA fails this requirement.[11]

3. Broadening "Progress" Does Not Save CTEA

Tacitly acknowledging the weakness in the government's argument, Senator Hatch suggests that CTEA might be saved by adopting a broader interpretation of "progress." Brief of *Amicus* Sen. Orrin G. Hatch at 6-26. He draws upon new research into the ordinary meaning of "progress" at the time of the framing, and suggests this broader conception—meaning roughly "spread"—validates CTEA. *Id.* at 10, 12. It does not.

Petitioners have adopted the meaning of "progress" employed by this Court. Pet. Br. 15-16. That "progress" is the "creation of useful works." *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 558 (1985). But even if this different conception of "progress" were adopted, CTEA would still be at odds with the structure of the Clause and its framing history.[12] For as petitioners have also demonstrated, whatever the meaning of "progress," the

[11] The only authority the government offers to support its claim that the Framers did not intend that Congress could "protect only 'Authors that promote' progress, or 'Writings that promote' progress" is *Mitchell Bros. Film Group* v. *Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979). Resp. Br. 19. But at the page the government cites, *Mitchell* states that while *each individual copyrighted work* need not "promote the Progress of Science," the Constitution "*require[s] that Congress shall promote those ends*." *Id.* (emphasis added).

[12] Petitioners share Professor Solum's skepticism about this newly discovered meaning of "progress." Solum, *supra*, at 77 ("One might say that the beetle progressed from the center of the table to the edge, but it would be odd, although not inconceivable, to say that the spilled milk progressed to cover the whole table"). In any case, even if "spread" were a common meaning, it would not follow that that meaning was the Framers'. For example, although "secure" had a common meaning at the time of framing—strengthening a preexisting right—this Court in *Wheaton* held there was no preexisting right for patents, at least, and so "secure" could not take that ordinary meaning. *Wheaton*, 33 U.S. at 661.

Framers granted copyright *only as part of a quid pro quo*. Pet. Br. 16. CTEA does not. Thus, even if "progress" means "spread," or "dissemination," or (anachronistically) "restoration," the monopolies that the Framers spread were not granted *on the mere hope* that something would be given in return. Their monopolies were offered upon the *condition* that something was given in return. *See* Paul S. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1143-44 (discussing quid pro quo). It is for this reason, among others, that the author of the primary source Senator Hatch relies upon herself concludes that CTEA is "unconstitutional per se." Brief of *Amicus* Malla Pollack at 13.

C. CTEA Fails Both Heightened Review Standards

Petitioners have advanced a *per se* rule banning retroactive extensions of terms without a quid pro quo. The government resists petitioners' rule by offering historical counter-examples. But if credited, the very same examples would defeat every other *per se* rule that this Court has adopted under the Copyright Clause. *See, e.g.*, Resp. Br. 13-14 (patent extensions removing knowledge from the public domain); *id.* at 14 n.6 (copyrights for works not "original"). Just as such counter-examples are insufficient to overcome these other *per se* rules, they should not defeat a *per se* rule governing "limited Times."

But if this Court finds these examples compelling, then, at the very least, this Court should require that Congress's extensions of term be "congruent and proportional" to a legitimate Copyright Clause end. Pet. Br. 31-32. Both standards ask the same ultimate question—does Congress's grant of a "limited Time[]" extension "promote the Progress of Science." The *per se* rule conclusively presumes, given the current length of the copyright term, that any blanket retroactive extension without a quid pro quo fails to "promote . . . Progress." The proportionality standard, in principle, would permit the government a showing that an extension

was congruent and proportional. On the record in this case, however, CTEA fails both standards.[13]

II. CTEA VIOLATES THE FIRST AMENDMENT

The government argues that any content-neutral copyright law that regulates expression rather than ideas, and preserves fair use, should be tested under rational basis review. Resp. Br. 40-43. Three claims underlie its argument: (1) petitioners have no First Amendment interest in "others' creative expression," Resp. Br. 46; (2) this Court so held in *Harper & Row Publishers, Inc. v. Nation Enterprise*, 471 U.S. 539 (1985), Resp. Br. 40-43; and (3) anything else could "destabilize" copyright law, Resp. Br. 48. All three claims are baseless.

A. CTEA Abridges Speech

The government and its amici assert that petitioners lack a sufficient First Amendment interest to challenge CTEA. They support their claim by belittling petitioners' speech interests. In the government's view, petitioners are mere "public domain copyists," Resp. Br. 17, 36, engaging in nothing more than the "mechanical reproduction" (Brief of *Amici* BNA *et al.* at 30) of "others' creative expression." Resp. Br. 46. And though some of the amici acknowledge that petitioners are more than mere "copyists," these amici fear that petitioners will use the cherished icons of American culture to "glorify drugs or to create pornography." Brief of *Amici* Dr. Seuss Enters. *et al.* at 19. In their view, CTEA's function is to ensure that the right to use these icons remains with those who can best control them.

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[13] The government also rejects the proportionality standard on the ground that it is drawn from federalism cases interpreting a limitation on the scope of Congress's Section 5 authority. Resp. Br. 28-29. But like Section 5, which must balance concerns about federalism against enforcement powers granted by the 14th Amendment, so too must the Copyright Clause balance concerns about free speech against the interest in securing exclusive rights. *See* Richard Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. __ (forthcoming 2002) ("On every side the creation of intellectual property is hemmed in by concerns for freedom of speech, whether or not these matters have received an explicit First Amendment analysis."), http://eldred.cc/e.

Yet plainly, petitioners and their amici are no mere Kinko's.[14] Petitioner Moviecraft is actively engaged in the preservation of early American film, as is *Amicus* Agee and the Prelinger Archives. Drawing upon the public domain films in the Prelinger Archive, documentary and independent filmmakers are able to create rich accounts of early 20th Century America. Using digital technology, *Amicus* Internet Archive has made vast amounts of American culture available free on the Internet, enabling others to build new creative work based upon these resources. Likewise, *Amicus* Michael Hart has converted public domain books into a form that enables computers to "read" those books to the blind. Petitioner Eldred, through the use of Web technology, creates searchable and linkable texts that enable educators to teach differently. The members of *Amicus* National Writers Union obviously produce new creative work, as does *Amicus* College Arts Association. Even petitioner Dover Books, which publishes many public domain works, typically includes within those publications critical analyses of classic texts, thereby enabling a broader understanding of those works.

The government's arguments do demonstrate, however, just why First Amendment review is necessary in a case like this. For to the extent Congress was choosing between "favored" creators and mere "public domain copyists," its choice signals a favoritism that could even raise a colorable claim for strict scrutiny under the First Amendment. *Turner Broadcasting v. FCC,* 512 U.S. 622, 676 (1994) (O'Connor, J., dissenting).

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[14] Nor does copyright reach "mechanical" reproductions only: While the "exclusive Right" regulated at the founding was little more than the right to control republication, copyright law today regulates much more broadly—to include, importantly, derivative works such as translations and adaptations. When future Senator Alan Cranston was sued in 1939 by the copyright holders of "Mein Kampf" for his unauthorized (and critically revealing) translation of that work, his speech was much more than the work of a "mere copyist." *See Houghton Mifflin Co. v. Noram Publ'g Co.,* 28 F. Supp. 676 (S.D.N.Y. 1939). When Alvin Katz and Chris Wrinn wrote a parody of the O.J. Simpson trial in the form of "The Cat in the Hat," their clever twist on the original, though restricted because not parody, was certainly not mere copying. *See* Brief of *Amici* Dr. Suess Enters. *et al.* at 25.

When Congress grants copyrights prospectively, it cannot know who will benefit from its grant. It therefore cannot select from among the potential beneficiaries those it likes and those it does not. But whenever Congress extends copyright terms retroactively, it is necessarily choosing among classes of speakers. That choice raises fundamental First Amendment concerns. *See, e.g., id.* ("it is normally not within the government's power to decide who may speak and who may not"); *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). *See generally* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein,* 54 STAN. L. REV. 1, 54-69 (2001).

In this case, for example, Congress was lobbied by the current owners of some of America's most famous creative works to give them a right to control work over which they otherwise would have had no claim. In granting these owners this new right, Congress necessarily chose between them and the creators and "copyists" who draw upon the public domain—authors such as petitioners, or their amici, or the next Walt Disney. *See* Brief of *Amici* National Writers Union *et al.* at 13; Brief of *Amici* Intellectual Property Law Professors at 20-21 (cataloging Disney's use of the public domain). That choice may well have been motivated by an objective judgment about who, between these two classes of creators, could best fuel an "engine of free expression." *Harper*, 471 U.S. at 558. But it may also have been motivated by a preference for these "favored" speakers over others.

It is precisely the risk of such favoritism that the First Amendment must police. Where there is a danger that a preference for certain speakers is operating to *restrict* speech, First Amendment review is designed to sift between appropriate and inappropriate motives. And while a related concern led some on this Court to suggest strict scrutiny in the context of cable regulation, *Turner Broadcasting,* 512 U.S. at 677-78 (O'Connor, J., dissenting), this Court need not apply that exacting standard to conclude that CTEA violates the First Amendment. Intermediate review as

adopted by this Court in *Turner* is sufficient to render CTEA unconstitutional.

The government tries to distinguish *Turner* by arguing the case was only about "forced access." Resp. Br. 45-46. *Turner* is not so limited. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (applying *Turner* to law that suppressed speech). Congress plainly could not escape heightened First Amendment review of cable regulations simply by reformulating "forced access" regulations into "banned access" regulations (requiring cable companies "not to carry" specified content on more than x% of its channels). Like copyright law itself, that regulation would "reduce the number of channels over which cable operators exercise unfettered control," *Turner,* 512 U.S. at 637, raising equivalent First Amendment concerns. The government therefore cannot distinguish *Turner*.

B. *Harper* Supports First Amendment Review

The government argues that *Harper* precludes any heightened review of CTEA. That conclusion would surprise the author who inspired the standard adopted in *Harper*. As scholars have noted, *Harper* drew its "definitional balancing" test from a 1970 article by Melville Nimmer. *See, e.g.,* Netanel, *supra*, at 7-12, citing Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970). In that same article, after describing "definitional balancing," Nimmer went on to address "specific areas where … [definitional balancing] does not properly balance the conflicting interests in copyright and free speech," *Id.* at 1193. The very first of these "specific areas" was copyright duration. As Nimmer concluded, retroactive extensions of copyright terms violate the First Amendment, *id.* at 1194-95, and Copyright Clause. *Id.* at 1195.

The reason "definitional balancing" did not resolve changes in duration is apparent from the opinion in *Harper* itself. *Harper* rejected a "public figure exception to copyright," 471 U.S. at 556-60, because copyright law, the Court observed, already contained built-in accommodations that mediated any conflicts between the First Amendment and copyright's scope. Given the facts of the case, because the Copyright Act (1) protects expression rather than ideas, and (2) allows for fair use, there was no need to add further restrictions on copyright law in the name of free speech.

Id. These two built-in accommodations were enough. If Congress were to change these two accommodations, then, as the government concedes, First Amendment review would "undoubtedly" be appropriate. Resp. Br. 41-42. But because CTEA does not change these particular accommodations, the government asserts that rational basis is the standard of review.

Yet *Harper* nowhere states that these two accommodations between First Amendment interests and copyright are the *only* accommodations built into the Act. They were simply the two at issue, and they sufficed to resolve the case. And as Nimmer's analysis makes clear, limitations on copyright's duration are *also* accommodations built into the Act (and mandated by the Constitution) that balance First Amendment interests and copyright. As Justice Stewart wrote for the Court in *Twentieth Century Music Corp. v. Aiken*, "[t]he limited scope of the copyright holder's statutory monopoly, *like the limited copyright duration* required by the Constitution, reflects a balance of *competing claims* upon the public interest." 422 U.S. 151, 156 (1975) (emphasis added).

If changes in the "balance" struck by the "limited scope" of copyright require First Amendment reweighing, then changes in the "limited . . . duration" of copyright must require First Amendment reweighing as well. No difference of principle could distinguish these two separate accommodations—especially as the free speech interests protected by limitations on duration are plainly distinct from the interests protected by limitations on scope. Pet. Br. 35-36.

C. Intermediate Review Has Not, and Will Not, "Destabilize" Copyright Law

The government asserts that heightened review could destabilize copyright law. Resp. Br. 48. It writes as if petitioners are the first to raise a claim for intermediate review of a copyright statute. Resp. Br. 45. But as the government is aware, an increasing number of courts have applied intermediate scrutiny to what the government calls "copyright statutes." Pet. Opp. 22; Pet. Reply 4-5. Either the government believes those cases are wrong, or it believes there is a clear line between those cases and this. The government has not said which it believes.

In any case, the government's fears are baseless. There is no slippery slope here because there is no slope. Just as *Harper* addressed the First Amendment in the narrow context of a claim about copyright's scope, this case should address the First Amendment in the narrow context of copyright duration mandated by the "limited Times" clause. Its rule, of course, should govern any future change in copyright duration. But as Congress, on the government's count, has changed copyright duration just five times in 210 years, Resp. Br. 7, there is no risk of a flood of new litigation. This is especially true if this Court strikes retroactive extensions, for given the current length of copyright, there could be no present incentive to extend the term prospectively again. Brief of *Amici* Akerlof *et al.* at 8. This case is therefore that rare example when one decision would decide the field.

D. The Government Effectively Concedes CTEA Cannot Survive Intermediate Review

For the first time in an appellate proceeding, the government has attempted to justify CTEA under heightened review. While it does not argue that the interests that retroactive changes are alleged to advance suffice for intermediate review,[15] it now argues, by analogy to a trademark case, that CTEA is constitutional. Resp. Br. 48 n.30 (citing *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987)).

This mocks intermediate review. A finding that a single trademark does not violate the First Amendment cannot, under the demands of intermediate review, automatically validate a term extension of a whole class of copyrights. Nor can it resolve the question of narrow tailoring. The grant of a particular trademark

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[15] The government has retreated from its claim below that CTEA "harmonizes" copyright law, Resp. Br. 3 (it now harmonizes just a "baseline" term), and it does not suggest that international trade considerations satisfy intermediate review. Resp. Br. 37-39. Likewise, the government has not suggested that *any* meager increase in incentives alleged to be produced by retroactive changes is enough to satisfy heightened review. In light of the analysis of economists *Amici* Akerlof *et al.*, the government's reluctance is understandable. In any case, neither trade nor harmonization may trump the constitutional requirement of "limited Times."

to a particular organization is at least tailored to a particular end. A blanket extension of all subsisting copyrights is not.

More fundamentally, there is no way that the government *could* satisfy *any* tailoring requirement on this record. Petitioners argued that if Congress wanted "restoration" of old works, or further "dissemination" of particular works, it could easily have achieved those ends in the same manner the Framers set—as a quid pro quo. Pet. Br. 16. Rather than an unconditioned grant, Congress could have offered a conditioned grant for restoration or a particular kind of dissemination. The government has offered no reply to this argument, Resp. Br. 34-37, because there is none. There was no reason for Congress to extend the term of all copyrights to secure the "restoration" or "dissemination" of some. As Professor Currie suggests, a concern for over-inclusiveness guided this Court's decision under the Copyright Clause in the *Trade-Mark Cases*. CURRIE, *supra,* 435 n.35. A similar principle should, under the First Amendment, ban extending the term of *all* copyrights on the hope that some *might* be restored.[16]

CONCLUSION

For the foregoing reasons, and in the manner described in petitioners' opening brief, Pet. Br. 50, the judgment of the court of appeals should be reversed.

[16] The government has also effectively conceded severability. It notes the court below did not pass on the question, Resp. Br. 48 n.31. But as resolving severability may allow this Court to avoid the constitutional question of prospective extensions, Pet. Br. 48, that is not a sufficient reason to avoid the issue now. Because Congress could not have intended severability where, as here, the text of the statute simply does not allow itself to be severed in a way that could apply constitutionally, the CTEA's entire extension of copyright terms must be struck.

Respectfully submitted,

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Comparison of Copyright Acts
1790, 1831, 1909, 1976, 1998

Property	1790	1831	1909	1976	1998
Extends terms of "subsisting works"	**Yes**	No	No	No	**No**
Extends terms of "subsisting copyrights"	**No**	Yes	Yes	Yes	**Yes**
Extends as part of a quid pro quo	**Yes**	No	No	Yes	**No**
Grants benefits presumptively to authors	**Yes**	Yes	No	No	**No**
Part of general copyright revision	**Yes**	Yes	Yes	Yes	**No**
Extends terms that had been extended before	**No**	No	No	Yes	**Yes**

COPY

No. 01-618

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL WRITERS UNION, CHARLES BAXTER, WENDELL BERRY, GUY DAVENPORT, WILLIAM GASS, PATRICIA HAMPL, EVA HOFFMAN, URSULA K. LEGUIN, BARRY LOPEZ, PETER MATTHIESSEN, JACK MILES, DAVID FOSTER WALLACE, LAWRENCE GOLAN, RONALD HALL, RICHARD KAPP, JOHN MCDONOUGH, THE UNITED STATES PUBLIC POLICY COMMITTEE FOR THE ASSOCIATION OF COMPUTING MACHINERY, COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY, THE APACHE SOFTWARE FOUNDATION, THE DOMAIN NAME RIGHTS COALITION, THE CENTER FOR THE PUBLIC DOMAIN, PUBLIC KNOWLEDGE, THE DIGITAL FUTURE COALITION, THE PUBLIC DOMAIN RESEARCH CORPORATION, THE CENTER FOR BOOK CULTURE, LITNET, THE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION, AND THE CONSUMER ELECTRONICS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief *amici curiae* in support of Petitioners is submitted by the National Writers Union, Charles Baxter, Wendell Berry, Guy Davenport, William Gass, Patricia Hampl, Eva Hoffman, Ursula K. LeGuin, Barry Lopez, Peter Matthiessen, Jack Miles, David Foster Wallace, Lawrence Golan, Ronald Hall, Richard Kapp, John McDonough, The United States Public Policy Committee for the Association of Computing Machinery, Computer Professionals for Social Responsibility, the Apache Software Foundation, the Domain Name Rights Coalition, the Center for the Public Domain, Public Knowledge, the Digital Future Coalition, the Public Domain Research Corporation, The Center for Book Culture, LitNet, the Computer and Communications Industry Association, and the Consumer Electronics Association ("*Amici*"), pursuant to Rule 37 of the Rules of this Court. *Amici* urge that the Court hold in favor of Petitioners and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

The National Writers Union is the only labor union that represents freelance writers in all genres, formats, and media. NWU's president, Jonathan Tasini, was the original plaintiff in *New York Times v. Tasini*, a case decided by this Court last term.

Charles Baxter is a fiction writer whose novel, *The Feast of Love*, was a 2000 National Book Award finalist and a New York Times Notable Book. Wendell Berry is the author of

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1. Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, or their counsel made a monetary contribution to the preparation or submission of this brief. American University, Washington College of Law, Glushko-Samuelson Intellectual Property Clinic students Christine Calareso, Lincoln Harris, Sheryl Rakestraw, and Timothy Tyre prepared this brief under the supervision of Professors Ann Shalleck, Joshua Sarnoff and Peter Jaszi, Counsel of Record.

9 works of fiction, 14 books of poetry, and 14 works of nonfiction, including *The Unsettling of America*. Berry is a recipient of a National Institute of Arts and Letters Award. Guy Davenport is an essayist, poet, critic and artist. He is a MacArthur Fellow and a winner of the O. Henry Award for fiction. William Gass, a recipient of the American Book Award for fiction and the National Book Critics Circle Award in criticism, has authored more than a dozen works of fiction and criticism. He was Distinguished University Professor in the Humanities at Washington University. Patricia Hampl's books include *A Romantic Education* and *Virgin Time*. A MacArthur Fellow, Hampl is currently Regents' Professor and McKnight Distinguished Professor of English at the University of Minnesota. Eva Hoffman is known for her memoir, *Lost in Translation*, and for her writings on Eastern Europe. A former editor at the *New York Times*, Hoffman currently teaches at the Massachusetts Institute of Technology. Lewis Hyde is a poet, translator, and prose writer whose works include *Trickster Makes This World*. He is the Thomas Professor of Creative Writing at Kenyon College and a MacArthur Fellow. Ursula K. LeGuin is the author of 17 novels and 11 children's books, as well as essays and poetry. Her awards include the National Book Award and a Newberry Silver Medal. Barry Lopez received the 1986 National Book Award for *Arctic Dreams*. Peter Matthiessen is a novelist and environmental activist whose nonfiction includes *The Snow Leopard*, which won the National Book Award. Jack Miles, senior advisor to the President of the J. Paul Getty Trust, won the Pulitzer Prize for his first book, *God: A Biography*. David Foster Wallace is the author of *Infinite Jest* and is a regular contributor to *Harper's*.

Lawrence Golan, Ronald Hall, Richard Kapp and John McDonough are the plaintiffs in an action currently before the United States District Court for the District of Colorado, seeking declaratory relief from and questioning the constitutionality of the Copyright Term Extension Act and the Uruguay Round Agreements Act. Golan is the Director of Orchestral Studies,

Conductor, and Professor of Conducting at the University of Denver's Lamont School of Music. He also conducts the Portland Ballet Orchestra, the Atlantic Chamber Orchestra, the Bolshoi National Opera and the Ballet Theatre of Uzbekistan. Kapp is the founder and conductor of the chamber orchestra Philharmonia Virtuosi and founder of the recording label ESS.A.Y Recordings. Hall is the founder of Festival Films, which sells public domain stock footage of movies and television shows. McDonough is the founder of Timeless Video Alternatives International, which preserves and distributes public domain movies and television shows.

The United States Public Policy Committee of the Association for Computing Machinery serves as the focal point for the association's interaction with U.S. government organizations, the computing community and the public in all matters of public policy related to information technology.

Computer Professionals for Social Responsibility is a public interest alliance of computer scientists and others concerned about the impact of computer technology on the public.

The Apache Software Foundation is a non-profit organization that promotes and supports the development of open-standards-based software.

The Domain Name Rights Coalition educates the public, religious groups, charitable organizations, non-profit groups and small businesses on how to choose, protect and defend domain names, and promotes free speech and communication.

The Center for the Public Domain passionately believes that the scientific, artistic and entrepreneurial spirit of our society relies on access to a robust public domain.

Public Knowledge is a public-interest advocacy and research organization that works with diverse creators,

consumers, civic groups and enlightened businesses to ensure that public access, creativity and competition are embodied in the digital age.

The Digital Future Coalition is an alliance of many of the nation's leading non-profit educational, scholarly, library and consumer groups, along with major commercial trade associations representing leaders in consumer electronics, telecommunications, computer and network access industries.

The Public Domain Research Corporation provides news and research about works that are in the public domain for multimedia, recording, film, television and other entertainment and publishing industry professionals.

The Center for Book Culture is a book and magazine publisher with literary programs in Chicago and at Illinois State University.

LitNet is a coalition of nonprofit literary organizations across the country and an educational and advocacy organization that promotes and protects the interests of writers and literary organization.

The Computer and Communications Industry Association is the leading industry advocate in promoting open, barrier-free competition in computer and communications products and services worldwide.

The Consumer Electronics Association is the trade association that represents over 600 major manufacturers of audio, video and home information equipment with over $90 billion in sales in the United States last year.

* * * * *

Amici are the vital links in the design of the United States copyright system, the creators and innovators who produce works that benefit the public through a process that the Copyright Term Extension Act ("CTEA") threatens. *Amici*, themselves copyright holders, are critical actors in a balanced copyright system, receiving incentives, benefiting from measured protections, gaining inspiration from, contributing to and utilizing copyright's public domain. *Amici* support a healthy balance between copyright protection and access to information. The CTEA personally affects *amici* because they experience restricted access to existing copyrighted materials including books, films, music and software. As a result, they are unable to reinterpret many works of the past to create new works. *Amici* offer a unique viewpoint on the actual effects of overprotective copyright laws and, thus, submit this brief to urge this Court to rule in favor of Petitioners and find the CTEA unconstitutional.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Distric: of Columbia Circuit incorrectly held that the Copyright Term Extension Act[2] ("CTEA") as passed by Congress in 1998 is constitutional.[3] The CTEA violates the Constitution by failing to promote the progress of science and useful arts.[4] The Framers of the Constitution understood that the creation of new works

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2. Pub. L. No. 105-298, 112 Stat. 2827 (1998). The CTEA grants an additional twenty years of protection to all works, except those created before Jan. 1, 1978 and not published prior to Jan. 1, 2003. Copyright Act, 17 U.S.C. §§ 302-303 (2000).

3. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

4. U.S. Const. art. I, § 8, cl. 8 ("Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

and subsequent public access to those works were vital to society; thus, they limited the copyright monopoly's duration to assure the development of a healthy public domain. The public domain serves not only as the repository of accessible works for enjoyment and use, but also as a foundation for new creations. The CTEA's passage has already significantly diminished the public domain, which remains in jeopardy.

The Constitution imposes a duty upon Congress in enacting any intellectual property law to determine that its legislation promotes innovation. However, of the major justifications for term extension set forth before Congress, including European Union harmonization, benefits to authors' families and film preservation are peripheral to the stated purpose of copyright: to promote cultural progress. Nor does the CTEA provide meaningful incentives to that end. In enacting the CTEA, Congress failed to ensure the progress of science and the useful arts, as required in the exercise of its power to create copyright protection.

ARGUMENT

I. THE FRAMERS INTENDED THAT COPYRIGHT PROTECTION PROVIDE A BALANCE BETWEEN PROTECTION FOR CREATIONS AND PUBLIC ACCESS TO THEM

Following the model of the English Statute of Anne, the founders of the American system of government created a copyright law that would operate for public, not private, benefit.[5] So strong were their sentiments about the appropriate goals of

5. *See generally* Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119 (2000); Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. Intell. Prop. L. 315 (2000).

copyright legislation that the grant to Congress of only limited power to act with respect to copyright was set forth in the Constitution.[6] The author is at the center of United States ("U.S.") copyright doctrine, but not because creators are its intended beneficiaries. Rather, innovators and creators are the instruments through which the law's public purpose is carried out. Characterizing this constitutional approach, the Court stated in *Harper & Row Publishers, Inc. v. Nation Enterprises*:[7]

> By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas. This Court stated in *Mazer v. Stein, 347 U.S. 201, 209 (1954)*: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"

As recently as last term, this Court reiterated that incentives for "individual effort" by creators are an essential part of the scheme envisioned in the Constitution.[8]

For the public purpose of copyright to be fulfilled, however, more than just economic incentives to authors are required: A healthy and vibrant public domain is essential to assure the continued supply of source material for innovation and creation. This aspect of the architecture of U.S. copyright law is reflected in the constitutional restriction on the duration of intellectual

6. U.S. Const. art. I, § 8, cl. 8.

7. 471 U.S. 539, 558 (1985).

8. *New York Times Co. v. Tasini*, 533 U.S. 483, 496 n.3 (2001).

property protection to "limited times."[9] Thus, copyright term extension has the potential to undermine the very purpose of copyright law, the promotion of cultural and scientific progress. Such legislation, of which the CTEA is the most recent example, should therefore be subject to careful constitutional scrutiny.[10]

Over the years the Court has repeatedly affirmed the Framers' vision of copyright. In *Steward v. Abend*, the Court stated, "the copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labor."[11] Similarly, in *Sony Corp. v. Universal City Studios, Inc.*, it stated that copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[12] Additionally, *Twentieth Century Music Corp. v. Aiken* acknowledged that:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.[13]

9. U.S. Const. art. I, § 8, cl. 8.

10. *See generally* Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyright Soc'y 19 (2001) (discussing the history of copyright term extension).

11. 495 U.S. 207, 288 (1990).

12. 464 U.S. 417, 429 (1984).

13. 422 U.S. 151, 156 (1975).

Indeed, since 1834, when its decision in *Wheaton v. Peters*[14] categorically rejected natural or "common law" rights in literary property, the Court has repeatedly reaffirmed that the various copyright statutes enacted by Congress must represent a balance between providing protection to authors and assuring access to "the result of their labours [that] may be . . . beneficial to society."[15]

If the goal of copyright law is to "stimulate artistic creativity,"[16] then the integrity of the public domain must not be compromised. The creation of new works is largely dependent upon access to the varied language, research, images, and other content of previous works. The concept that all, or even most, new works are wholly original is unfounded; rather, many great works have been the artful retelling of others' stories.[17] New creations and innovations require the interaction of inspiration with the availability of previous works in all genres, including books, music, software, the visual arts and film.

Many literary works are the interpretations of older stories. Mark Twain was a vocal advocate of broad copyright protection

14. 33 U.S. (8 Pet.) 591 (1834).

15. *Id.* at 657-8; *see also* L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 J. Intell. Prop. L. 223, 231 (2001): "[T]he Constitution requires that the copyright statute Congress enacts shall be designed to do three things: to promote learning, because the clause so states; to protect the public domain, because copyright is available only to authors only for their original writings only for a limited time; and public access. . . ."

16. *Aiken*, 422 U.S. at 156.

17. *See* Jessica Litman, *The Public Domain*, 39 Emory L. J. 965, 966 (1990) ("The very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.").

but freely admitted that his work was less than wholly original.[18] Twain once wrote that "substantially all ideas are second-hand, consciously or unconsciously drawn from millions of sources . . . ; whereas there is not a rag of originality about them. . . ."[19] The truth behind this colorful overstatement is seen in Twain's famous work, *The Adventures of Huckleberry Finn*, which was his retelling of Homer's *The Odyssey*.[20] Twain's reliance on the public domain, however, did not end there. Not only is Huck Finn an American version of Ulysses, but Huck's narrative voice draws on and improves the American oral storytelling tradition.

Judge Richard Posner, building upon Melville Nimmer's assertion that *West Side Story* would infringe *Romeo and Juliet* if *Romeo and Juliet* were copyrighted, concluded:

> *Measure for Measure* would infringe *Promos and Cassandra*, *Ragtime* would infringe *Michael Kohlhaas*, and *Romeo and Juliet* itself would have infringed Arthur Brooke's *The Tragicall Historye of Romeo and Juliet*, published in 1562, which in turn would have infringed several earlier *Romeo and Juliets*, all of which probably would have infringed Ovid's story of Pyramus and Thisbe – which in *A Midsummer Night's Dream* Shakespeare staged as a play within the play. If the Old Testament had been copyrighted, *Paradise Lost* would have infringed it, not to mention *Joseph and his Brothers*.[21]

18. *See generally* Siva Vaidhyanathan, *Copyrights and Copywrong: The Rise of Intellectual Property and How it Threatens Creativity* 56 (2001) (noting that Twain boasted of liberally borrowing from others' stories).

19. *Mark Twain's Letters* 731 (Albert Bigelow Paine ed., 1917), *quoted in* Vaidhyanathan. *Id.* at 64.

20. Vaidhyanathan, *supra* note 18, at 69.

21. Richard A. Posner, *Law and Literature* 399 (2d ed. 2000) (citation omitted).

Aggressive copyright laws, in particular the CTEA, impermissibly threaten this kind of cumulative creativity.[22]

Similarly, many renowned musical works are based on previous creations. For example, "Good Night Sweetheart" (1931) is based on themes from Schubert's Symphony in C and Liszt's Preludes, "Love Me Tender" (1956) is based on "Aura Lee" by George Poulton, and "The Lion Sleeps Tonight" (or "Wimoweh") (1962) is based on a traditional African song.[23]

The American blues tradition also illustrates the reliance of creative innovators on the music of the past. The blues originally derived from West African music and rhythm and developed as musicians of each generation repeated and embellished the musical and lyrical contributions of their predecessors. This dynamic process not only carries forward cultural traditions but has generated new musical movements such as jazz and rock and roll.[24]

In other very different domains of innovation, such as computer software development, reliance on pre-existing material in the creation of new works also is ubiquitous. The rapid development of the U.S. software industry since the 1970's has been fueled by the fact that:

> Innovation in software development is typically incremental. Programmers commonly adopt software design elements . . . by looking around for

22. *Id.* at 403 ("The more extensive is copyright protection, the more inhibited is literary imagination. This is not a good reason for abolishing copyright, but it is a reason possibly for narrowing it, and more clearly for not broadening it.").

23. Stephen Fishman, *The Public Domain, How to Find and Use Copyright* 4/38 (2001). *See also* Ochoa, *supra* note 10, at n.10, (discussing additional musical works based on existing works from the public domain).

24. Vaidhyanathan, *supra* note 18, at 125.

> examples or remembering what worked in other programs. These elements are sometimes adopted wholesale, but often they are adapted to a new context or set of tasks. In this way, programmers both contribute to and benefit from a cumulative innovation process.[25]

Software is a young field, and no software has yet entered the public domain via copyright expiration. Nevertheless, software engineers understand the importance of access so well that some programs have achieved near-public domain status. One is the so-called "Berkeley TCP/IP stack" that enables computers to be connected to the Internet. The University of California licenses it on terms that allow anyone to make any use of it, with proper attribution. This software was incorporated into several popular operating systems and played an important role in the growth of the Internet. Ultimately, however, such affirmatively designed substitutes for the public domain cannot be relied upon alone to sustain cumulative innovation.[26]

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25. *See* Pamela Samuelson, *et al.*, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 Colum. L. Rev. 2308, 2330-31 (1994).

26. Another attempt to approximate a public domain for software is the GNU Public License ("GPL"), which covers many popular copyrighted software programs including the Linux operating system. Software covered by the GPL may be examined and used freely by anyone, provided that any derivative works are also licensed under the GPL. A large and diverse community of programmers works on GPL-covered software and thus contributes to the GPL's pseudo-public domain. Opponents of the GPL's use, such as Microsoft, point out that the GPL prevents the software it covers from being incorporated into commercial products; and thus, they argue, the GPL's pseudo-public domain is an inferior substitute for a real public domain. *See, e.g.*, Prepared Text of Remarks by Craig Mundie, Senior Vice President, Microsoft, Inc., "*The Commercial Software Model*," New York University Stern School of Business, May 3, 2001, http://www.microsoft.com/presspass/exec/craig/05-03sharedsource.asp (last visited May 13, 2002).

Corporate producers of intellectual property as well as individual creators repeatedly have reaped the benefits of using previously created works for inspiration. Most of the Walt Disney Company's widely acclaimed animated feature films are based upon preexisting stories. For example, *Snow White* and *Cinderella* are based upon the Grimm Brothers' *Children and Household Tales* (*Grimms' Fairy Tales)*; while *Pinocchio*, *The Little Mermaid*, *The Jungle Book*, and the *Hunchback of Notre Dame* are based upon modern literary works by Carlo Collodi, Hans Christian Anderson, Rudyard Kipling and Victor Hugo, respectively. Moreover, all these literary works were in the public domain when the films were released. Even the ubiquitous Mickey Mouse bears a striking resemblance to an earlier large-eared, big-footed, button-nosed, wide-eyed, britches-wearing character called Oswald the Lucky Rabbit.[27]

Another example of the derivation of figures of popular culture from preexisting material is the Wile E. Coyote character. Created by cartoonist Chuck Jones for Warner Bros., Wile E. Coyote not only carries the mark of Jones' creativity, but also incorporates elements of multiple preexisting sources and traditions, including Mark Twain's tales of coyotes in *Roughing It* and the Trickster figure of Native American folklore.[28]

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27. *See* Russell Merritt and J.B. Kaufman, *Walt in Wonderland* 86-119 (1993). The similarities between the two characters illustrate the extent to which new creations in the realm of popular culture often rely on preexisting materials. Walt Disney's early Oswald cartoons drew heavily on general cartooning motifs and specific prior copyrighted works. After losing the rights to the design of the Oswald character, Disney nonetheless reused many of its elements in creating Mickey Mouse. *Id.*

28. *See* Shelly Fisher Fishkin, *Lighting Out for the Territory: Reflections on Mark Twain and American Culture* 147-9 (1997); *see also* Lewis Hyde, *Trickster Makes This World* 18-19 (1999) (describing the Native American Trickster character as a coyote that often fell prey to his own traps).

Ironically, companies and industries that have drawn freely on preexisting materials (including those in the public domain) to create their own copyrighted works were instrumental in advocating copyright term extension. The result was legislation, the CTEA, that created a 20-year moratorium on the addition of material to a vital public resource.

The public domain enables creation or "artful retelling" by serving as "a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."[29] In addition to academic commentators, the judiciary has recognized the importance of this resource:

> Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.[30]

The CTEA exemplifies the concern to which this passage points: freezing the public domain by limiting contemporary creators' access to many works that could generate new creation. This legislation does not nurture creative minds, but instead stifles the process of innovation through overprotection.

Amongst the most glaring omissions Congress made when considering the CTEA were its failures to assess the cost of the

29. Litman, *supra* note 17, at 968.

30. Kozinski, J., dissenting from the denial of the petition for rehearing *en banc*, *White v. Samsung Electronics Inc.*, 971 F.2d 1395, *petition for reh'g en banc denied*, 989 F.2d 512, 513; *cert. denied*, 508 U.S. 951 (1993).

legislation to the public domain and the future of innovation and to balance that cost against whatever benefits the legislation might offer the public welfare.

II. CONGRESS FAILED IN ITS OBLIGATION TO FULLY CONSIDER THE EFFECTS OF ENACTING THE CTEA

Every law enacted by Congress must be based on powers granted to it by the Constitution: "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written."[31] The ultimate question for this Court is whether Congress, in enacting the CTEA, violated its constitutional duty when it extended monopoly protection for copyrighted works without regard to the impact upon the accessibility of cultural products for new creation and the enrichment of the public. The Constitution grants Congress the power to legislate copyright protection for authors, but requires that Congress exercise this power in order to promote the public interest. Congress neglected this limiting principle when it enacted the CTEA, which blocks the entry of works into the public domain and thereby damages a mechanism that contributes substantially to cultural progress.

Any major adjustment in the scope of intellectual property protection must be directly linked to the promotion of creation and innovation. In *Graham v. John Deere Co.*, the Court stated that the grant of authority over patents in the intellectual property clause:

> [I]s both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the 'useful arts.'[32]

31. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

32. 383 U.S. 1, 5 (1966).

The Court further stated that "Congress in the . . . exercise of the patent power may not . . . enlarge the patent monopoly without regard to the innovation, advancement, or social benefit gained thereby."[33] While *Graham* specifically addressed constraints on the congressional patent power, Congress' power over copyrights is similarly limited.[34] But in enacting the CTEA, Congress failed to give due regard to the public purposes of copyright.

Before passing the CTEA, Congress appears to have paid insufficient attention to the Constitutional basis for its actions and to have given great credence to issues tangential to its constitutional duty. Had it thoroughly examined the implications of the extension, Congress would have found it constitutionally unwarranted. While the House and Senate Judiciary Committees issued reports after holding numerous hearings in successive Congresses, the Congress did not adequately address many issues that should have been considered, including the threat term extension poses to the public domain as a "creative commons."[35]

Of course, Congress did suggest various affirmative justifications for the CTEA, but none of these furthered the constitutional purpose of copyright. Their presence in the record is insufficient to uphold legislation that violates the constitutional limitation on the exercise of its congressional power.

In *United States v. Lopez*, the Court held that Congress' exercise of regulatory authority under the commerce clause must

33. *Id.* at 6.

34. *See* Ochoa, *supra* note 10, at 103-6.

35. *See generally* S. Rep. No. 104-315 (1996); H.R. Rep. No. 105-452 (1998).

be carefully scrutinized when it is in tension with an important limiting constitutional principle.[36] There this Court took a critical view of the congressional justifications for the exclusion of guns from school zones because Congress' power was constrained by constitutional limitations relating to federalism. Here, this Court should scrutinize the proffered congressional justifications for the CTEA with similar care, because the constitutional grant of power to create protections for authors is constrained by the intellectual property clause's requirement that such protection be solely for the promotion of cultural and scientific progress. In exercising this power, Congress "may not overreach the restraints imposed by the stated constitutional purpose."[37]

Among the asserted justifications for term extension were harmonization of U.S. copyright law with the law of the European Union ("E.U."), the provision of benefits to authors and their heirs, and even the promotion of motion picture preservation. The foregoing reasons, however, all fail to support an exercise of congressional power that disregards the constitutional mandate to balance exclusive rights with the promotion of progress. All of these justifications are irrelevant to the constitutional purpose of copyright and most are without factual foundation. In addition, the CTEA fails to provide meaningful incentives to creativity and innovation of the kind that the U.S. copyright system is designed to afford.

36. 514 U.S. 549, 564 (1995) ("We rejected these [government] arguments because . . . if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."). In the Court of Appeals below, Judge Sentelle stated, "Congress concluded a given piece of legislation that serves a constitutional purpose 'does not necessarily make it so.'" *Eldred v. Reno* 253 F.3d at 854 (2001) (Sentelle, J., dissenting) (citing *Lopez*, 549 514 U.S. at 557 n.2, *United States v. Morrison*, 529 U.S. 598, 614 (2000).

37. *Graham*, 383 U.S. at 5-6.

A. EUROPEAN UNION HARMONIZATION

The justification most widely offered to Congress in support of the CTEA was the importance of bringing U.S. copyright law into alignment with E.U. law.[38] For example, the Motion Picture Association of American ("MPAA") offered testimony stating that copyrighted works were America's most successful export, earning roughly $45 billion a year abroad, but that some additional potential revenue was diverted from U.S. copyright holders due to the disparity of protection between the U.S. and some European nations.[39] Accordingly, the industry concluded that this revenue could be preserved only by passing the CTEA and, thus, securing 20 years of additional protection for U.S. works in Europe. However, the maintenance of the U.S. position in the international information marketplace, whether desirable or undesirable, is an objective unrelated to the kind of "progress" envisioned in the constitutional clause regarding intellectual property.

The goal of copyright is not to create wealth, but to stimulate innovation. While E.U. harmonization might produce wealth for some, the costs to domestic "progress" are potentially steep. Americans, who are greater users of U.S. works than citizens of other countries, now must suffer from the discouraging effects of copyright extension upon domestic creativity.[40]

The inappropriateness of discouraging new domestic creativity in order to align U.S. law with that of Europe becomes

38. *See generally* S. Rep. No.104-315 (1996); H.R. No. 105-452 (1998).

39. *See The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Judiciary Comm.*, 104th Cong. 40-41 (1995) ["1995 Senate Hearings"] (statement of Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America (["Valenti statement"])).

40. *See infra* notes 50-66 and accompanying text.

even more apparent when one considers the different bases of European and U.S. intellectual property systems. The ultimate goal of European copyright law is to benefit authors and creators rather than to promote a larger public purpose; European law embodies a natural rights theory that treats copyright as a simple entitlement.[41] Conversely, the U.S. copyright system is based on the unequivocal constitutional directive that new innovation be promoted through limited economic incentives. This incentive-based scheme explicitly rejects any focus on natural rights.[42] Consequently, the U.S. cannot, consistent with the Constitution, fully align itself with the philosophically different E.U. system.[43]

41. *See* Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* 5-6 (1987) "([Eighteenth century French copyright laws placed authors' rights on a more elevated basis than the [British] Statute of Anne. . . . [T]he rights being protected [were treated] as being embodied in natural law. . . . This new conception of author's rights had a great effect on the law of France's neighbors. . . .").

42. *See* 33 U.S. (8 Pet.) at 657-63, *see also* H.R. Rep. No. 2222, at 7 (1909):

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based on any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but on the grounds that the welfare of the public will be served and the progress of science and useful arts will be promoted. . . .

By the same token, in the United States copyright is viewed as an "impingement on the public domain," a concept that would have no meaning in the European philosophical context. *See* L. Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 Vand. L. Rev. 1,7 (1987).

43. *See* Dennis S. Karjala *et al.*, *Statement of Copyright and Intellectual Law Professors in Opposition to H.R. 604, H.R. 2589, and S.505* (Jan. 28, 1998) http://www.law.asu.edu/HomePages/Karjala/

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B. BENEFIT TO AUTHORS

In justifying the CTEA, Congress also relied on the fact that term extension would generate benefits to copyright owners, including individual authors and their families, in the form of possible additional revenue from their works. While such benefits may be welcome, they do not in themselves represent "progress" in the constitutional sense and therefore cannot be weighed against the costs to new creativity that flow from the harm the CTEA has wreaked on the public domain.

As demonstrated below,[44] neither the prospect of additional income from Europe, nor the increased domestic protection provided by the CTEA, functions as a meaningful incentive to new creativity or innovation, the only constitutional basis that would have enabled congressional action in enacting the CTEA. In the legislative history, however, it is suggested that Congress may have regarded the benefits of term extension to copyright owners, particularly the heirs of individual authors, as an independent justification for term extension.[45] If so, this rationale represents a fundamental congressional misunderstanding of the constitutional goals of the U.S. intellectual property system.

This is true, in particular, with respect to one provision of the CTEA that was specifically designed to benefit individual authors and their successors, which amends section 304 of the

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OpposingCopyrightExtension/legmats/1998Statement.html (last visited, May 14, 2002): ("[W]e cannot allow discrimination in Europe to force us to change our entire intellectual property philosophy — based on the public interest — just to put a few dollars into the pockets of descendants and assignees of creative authors from the distant past.")

44. *See* discussion *infra* pp. 23-28.

45. *See, e.g., 1995 Senate Hearings*, *supra* note 39, at 58-59 (statement of Mrs. Henry Mancini, widow of Henry Mancini).

Copyright Act. The amendment grants an extra opportunity to reclaim rights that authors and their successors had assigned away. This provision was specifically designed to give "original authors or their dependents . . . the opportunity to bargain for the rights provided by the 20-year copyright term extension," (if and only if they had not already exercised termination rights in the 19-year additional term provided by the 1976 Act.)[46] In other words, the CTEA gives some authors and heirs an additional chance to take a "second bite at the apple" in exploiting their works. Although this economic opportunity may represent a desirable reallocation of wealth among authors' families and authors' assignees, it is irrelevant to the constitutional purpose of copyright and fails to serve as a true incentive to new creation.

C. FILM PRESERVATION

Another rationale presented to and embraced by Congress was the purported effect of term extensions in promoting the preservation of historic American films.[47] However, this justification fails to support the enactment of the CTEA for several reasons. As important as maintaining old commercial motion pictures may be, this function is not the objective of the copyright system, which exists to promote *new* innovation and creativity. Moreover, Congress had before it no testimony from which it could conclude that the asserted connection between extended protection and film preservation was a genuine one.[48]

46. Copyright Act, 17 U.S.C. §§ 303-304 (2000).

47. *See* Valenti statement, *supra* note 39, at 42, and S. Rep. No. 104-315 at 13 (1996).

48. *See* Ochoa, *supra* note 10, at 123-4

"The CTEA is not narrowly tailored to serve this objective; it extends all existing copyrights, whether or not the work

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Because the physical instability of nitrate motion picture stock results in the certain eventual decomposition of the original negatives as well as surviving prints, this extension serves to make films that would have entered the public domain unavailable for preservation by independent enthusiasts and entrepreneurs while that preservation is still possible.[49] Thus, this extension, by making these films legally inaccessible, actually prevents many priceless motion pictures from ever being restored.

D. LACK OF ADDITIONAL INCENTIVES AND NEW DISINCENTIVES FOR INDIVIDUAL CREATORS

Although promoting creativity was a rationale for enacting the CTEA,[50] Congress did not seriously evaluate the CTEA's

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> is in any danger of deterioration . . . reward[ing] those corporate copyright owners who allowed the films to deteriorate in the first place, without requiring any restoration efforts at all. If films were allowed to enter the public domain sooner rather than later, they would not disappear; instead they could be restored by [other] organizations."

49. *See* John McDonough, *Motion Picture Films and Copyright Extension* (2002), http://www.public.asu.edu/~dkarjala/commentary/McDonough.html (last visited May 13, 2002).

50. *See, e.g., 1995 Senate Hearings, supra* note at 55-57 (statements of Don Henley, Bob Dylan and Carlos Santana) (asserting that support of the CTEA was based primarily on the potential exploitations of their grandchildren); *compare with* S. Rep. No. 104-315, at 32 (1996) (statement of Sen. Brown in dissent):

> There is nothing in the hearing record that suggests extending the copyright term will result in more works or

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incentive effects, if any, on authors considering new creative efforts. In one respect, of course, the incentive rationale was utterly without merit: By definition, retrospective term extension for existing works cannot promote new creativity. There can be no incentives to create works that already exist.

Moreover, as the Register of Copyrights conceded in her Senate testimony, the positive incentive effects of the additional terms for new works are at best trivial.[51] The additional protection will only take effect far in the future, when the present discounted value of any additional revenue is vanishingly small, to say nothing of highly uncertain. In contrast, through additional access costs and problems in obtaining copyright clearances, the CTEA imposes immediate and significant disincentives on contemporary authors seeking to create new works.

The CTEA added 20 years of protection to the end of an existing life-plus-50 year term. The possibility of income so far in the future can provide at best a negligible additional incentive for current productive effort, even given unrealistically generous assumptions. An example would be the case of a 35-year old author, who writes a book today that will generate an assured annual royalty of $5,000 throughout the term of protection under the CTEA – 110 years if the author lives to be 75. If this individual's personal discount rate is 5 percent, the total economic value of the final 20 years of protection at the time of

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> higher quality works. Indeed our success as a nation of creators suggests the opposite. The majority report observes that copyright term extension may provide an incentive to create for corporate creators: another 20 years of revenue from current works might, for example, subsidize new motion pictures. However, this is more a corporate subsidy than an incentive to create.

51. *See infra* note 64.

the work's creation would be only $771.80.[52] In fact, individuals' real discount rates are actually much higher, reducing further any present incentive value of copyright protection in the remote future.[53] Moreover, for many creative works the potential for future returns is highly uncertain, rather than assured, and likely to decrease over time. These factors would cause the contemporary author to further discount the present value of possible future income.[54] However, there is no indication that in enacting the CTEA Congress took the economic realities of incentives into account in assessing the benefits and costs to creativity.

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52. By contrast the cumulative *present* value of economic returns from years 0 to 90 is $98,761.31. This can be measured by summing the present value of each year's return. The present value of a payment in the future is $[1/(1+r)^t]A$, where r is the discount rate, t is the years in the future, and A is the payment amount. *Cf.* Stephen Breyer, *The Uneasy Case for Copyright*, 84 Harv. L. Rev. 281, 324 (1970) (increased present value of term extension is "hardly enough to effect [the author's] decision to write in the first place. . . .").

53. The discount rate should reflect both the inflation rate and some additional amount, because people prefer money in the short term and could make alternative investments of money (or creative effort). *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 Colum. L. Rev. 941, 958-59 (1999).) Individuals may have personal economic discount rates that approach 50% per year, which are not limited to monetary decisions, but also affect other choices. *See, e.g.*, U. Benzion, *et al.*, *Discount Rates Inferred from Decisions: An Experimental Study*, 35 Management Science 270 (1989); R.H. Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, 8 Economic Letters 201 (1981); G.B. Chapman, *Temporal Discounting and Utility for Health and Money*, 22 J. Exper. Psych.: Learning, Memory, and Cognition 771 (1996).

54. *See, e.g.*, Breyer, *supra* note 53, at 324, n.169; *see also* Paul Goldstein, *Copyright § 4.7*, at 4:138 (Supp. 2001) ("According to the 1961 Report of the Register of Copyrights, fewer than fifteen percent of all copyrights were renewed under the 1909 Act.").

The CTEA imposes substantial and immediate disincentives on authors seeking to create new works that far outweigh any trivial and uncertain economic incentives for current production. Because of the CTEA, authors will continue to need rights clearances to draw upon existing copyrighted material that would otherwise enter the public domain. As a result, they will encounter extra expense, hardship and uncertainty, all of which stifle the creative process.[55] For example, concerns over potential liability dictate that any copyrighted work used in a film, even incidentally, must be cleared.[56] This applies even to the use of a poster on a wall or a billboard in the background: "Almost every piece of artwork, any piece of furniture, or sculpture, has to be cleared before you can use it."[57] This clearance problem was highlighted by a successful director who, when asked what advice he would give to a young film maker, replied:

> I would say to an 18-year-old artist, you're totally free to do whatever you want. But – and then I would give him a long list of all the things that he couldn't include in his movie because they would not be cleared, legally cleared. That he would have to pay for them. [So freedom? Here's the freedom]: You're totally free to make a movie in an empty room, with your two friends.[58]

Another serious inhibition on the creative process resulting from copyright extension is the rigid control often wielded

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55. Lawrence Lessig, *The Future of Ideas* 3-4 (2001).

56. *See, e.g.*, *Woods v. Universal City Studios, Inc.*, 920 F. Supp 62 (S.D.N.Y. 1996) (enjoining distribution of the film *Twelve Monkeys* because an artist claimed a chair shown briefly in the movie resembled a sketch of a piece of furniture he had designed).

57. Lessig, *supra* note 56, at 3 (quoting Davis Guggenheim in a telephone interview conducted by Lawrence Lessig on Nov. 15, 2000).

58. *Id.* at 5.

by heirs to works, long after the original authors' deaths. Such barriers, now wholly disassociated from the incentives that once inspired the works' creation, frustrate the creativity of new authors. For example, the Gershwin Family Trust retains complete control over the present stage uses of *Porgy and Bess* (1935),[59] demanding absolute compliance with their wishes by potential licensees. A notable condition is that the work be performed only by an all-black cast.[60] George Gershwin has been dead for 65 years; new and varied styles of performance and theatrical representation have emerged since his death.[61] His work could serve as an inspiration for creative interpretations of the powerful themes he introduced; however, his heirs remain inflexible.

Similarly, Margaret Mitchell's estate maintains an iron grip on the classic novel *Gone With the Wind*, published in 1936. Although the copyright for *Gone With the Wind* was initially due to expire in 1992, successive term extensions culminating with the CTEA have restricted the free availability of the work for use and adaptation by artists and the public until 2031. The Mitchell estate is thus in a position to aggressively prosecute

59. *See* John Ardoin, *The Great "Porgy" Debate*, http://www.pbs.org/wnet/gperf/porgy/html/work.html (last visited May 8, 2002). *Porgy and Bess* is derived from Edwin DuBuse Heyward's book *Porgy* (1924). The book was based upon newspaper articles and real life memories of Heyward's life in Charleston: his access to the public domain enriched his story and Gershwin's subsequent opera. *Id.*; *See also* Anthony Tommasini, *All-Black Casts for 'Porgy'? That Ain't Necessarily So*, N.Y. Times, Mar. 20, 2002, at E1.

60. *See* Gail Russell Chaddock, *Public Interest v. Private Rights*, Chi. Sun-Times, June 2, 1998, at 31.

61. *See, e.g., Patrick Stewart: The Veteran Shakespearean Actor Brings a "New Kind of Othello" to The Shakespeare Theatre*, http://www.shakespearedc.org/stewart1.html (last visited May 9, 2002) (discussing the novelty of the casting of Patrick Stewart as Othello while casting people of color in all other principal roles).

authors such as Alice Randall. Randall recently attempted to draw upon *Gone With the Wind* as a source for creating her own Afro-centric comment on this historically important work. Her creative effort resulted not only in a socially relevant work, *The Wind Done Gone*, but a lengthy lawsuit including, initially, an injunction against the book's publication.[62] Some determined authors, like Randall, ultimately may succeed in overcoming the chilling effect of copyright term extension. However, its discouraging effect on others, and the resultant costs to public culture, are incalculable.

E. ECONOMICS OF CORPORATE CULTURAL PRODUCTION

With respect to both prospective and retrospective copyright term extensions provided by the CTEA, Congress may also have been influenced by a rationale advanced by corporate copyright holders, most persuasively in the testimony of Jack Valenti, President of the MPAA: Valenti argued that corporations would respond to the economic benefit they received from term extension by engaging in new production of copyrightable works, stating that:

> One of the great secrets of the American dominance in the world is their ability to pour into a film enormous resources. The most talented people in the world cost money. . . . Unless we are able to protect what we own in our libraries, we will be unable in the future, in the year 2010 and thereabouts, when the new technology has avalanched through this

62. *See Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp.2d 1357 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir 2001); *see also* David Kirkpatrick, *Mitchell Estate Settles 'Gone With the Wind' Suit*, N.Y. Times, May 10, 2002, at C6, Col. 1 (discussing the case's recent settlement). The issues raised by the case remain pertinent because "the settlement did not affect rights to film adaptations or any other versions of 'The Wind Done Gone.'" *Id.*

> whole landscape, not in this country, but around the world, then we are doing a terrible economic injustice to the Treasury of the United States.[63]

At least one government witness echoed this rationale:

> [I]t is difficult to see how moving from a term of life-plus-50 to life-plus-70 will encourage authors to write. It could, however, provide additional income that would finance the production and publication of new works.[64]

However, Congress could not constitutionally employ the grant of intellectual property power to distribute economic windfalls that might (or might not) be used to finance hypothetical future production in general, as Valenti requested. As this Court has repeatedly noted, the Constitution contemplates incentives for the "encouragement of individual effort" by authors to create particular new works.[65] In arguing for the CTEA, corporate copyright owners sought and received an umbrella of additional copyright protection designed to increase their overall economic security and profitability, rather than to directly promote specific creative projects.

This justification for the CTEA may represent the vision of corporate copyright owners today, but it is in direct conflict with the vision, intent and practice of the Framers. U.S. copyright law was designed to promote the public good by giving direct incentives to creativity and innovation, not to enhance corporate balance sheets.

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63. Valenti statement, *supra* note 39, at 90.

64. *1995 Senate Hearings*, *supra* note, at 6 (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

65. *Harper & Row*, 471 U.S. at 558.

This Court recently expressed skepticism about arguments that cultural progress can best be achieved by interpreting copyright law to accommodate large scale information industry business models. In *Tasini*, which concerns the imbalance of power between large publishing companies and freelance writers who contributed to their publications, this Court concluded that the "public welfare" would suffer if the interests of individual writers were overshadowed by the welfare of corporate content aggregators.[66] As this Court has appropriately recognized, copyright law as envisioned by the Framers was designed to promote the public welfare by encouraging authors to create, not by subsidizing corporate scale.

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66. *Tasini*, 533 U.S. at 496 n. 3 (citing *Harper & Row*, 471 U.S. at 558 (quoting *Mazer*, 347 U.S. at 219)) (protecting the copyrights of freelance authors that had been preempted by print publishers and database corporations).

CONCLUSION

Congress failed the American people by not performing its constitutional duty to balance the speculative and questionable benefits of copyright term extension against the certain harms to the public domain. This failure is reflected in the lack of any rationale for the legislation that is supported by a legitimate constitutional purpose. Congress enacted the CTEA based upon justifications that, although superficially attractive, were not relevant to, or lacked a demonstrated connection with, the Framers' mandate that copyright law promote cultural progress. Instead, the CTEA stifles creativity that draws upon existing works and denies society the benefits of a vibrant public domain. This Court must ensure that Congress, in exercising power over copyrights, fulfills its constitutional duty to consider with great care the effect of copyright protection on the progress of "Science and the useful Arts." Protections that do not promote this progress should be struck down.

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF LAW LIBRARIES, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, DIGITAL FUTURE COALITION, MEDICAL LIBRARY ASSOCIATION AND SOCIETY OF AMERICAN ARCHIVIST IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief *amici curiae* in support of Petitioners is submitted by the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Digital Future Coalition, the Medical Library Association, and the Society of American Archivists ("*Amici*") pursuant to Rule 37 of the Rules of this Court. *Amici* urge that the Court grant the requested writ of certiorari and reverse the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

The **American Association of Law Libraries** is a nonprofit educational organization of over 5,000 members who respond to the legal information needs of legislators, judges, and other public officials at all levels of government, corporations and small businesses, law professors and students, attorneys, and members of the general public.

The **American Library Association** is a nonprofit educational organization of approximately 61,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries

The **Association of Research Libraries** is a nonprofit association of 123 research libraries in North America including university, public, government, and national libraries whose mission is to influence the future of research libraries in the process of scholarly communication.

The **Digital Future Coalition** is a forty-one member alliance of many of the nation's leading non-profit educational, scholarly, library, and consumer groups, as well as major

1. Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, made a monetary contribution to the preparation or submission of this brief. American University, Washington College of Law, Glushko-Samuelson Intellectual Property Clinic Students Christine Calareso, Lincoln Harris, Sheryl Rakestraw, and Timothy Tyre prepared this work under the supervision of Professor Ann Shalleck and Counsel of Record Professor Peter Jaszi.

commercial trade associations representing leaders in consumer electronics, telecommunications, computer, and network access industries.

The **Medical Library Association** is an educational organization of more than 1,000 institutions and 3,800 individual members in the health sciences information field.

The **Society of American Archivists** represents more than 3,000 individuals and 400 institutions and is the authoritative voice in the United States on issues that affect the identification, preservation, and use of historical records.

* * * * *

Amici are organizations whose members engage in practices such as preserving cultural heritage, providing educational materials, sponsoring research, digitizing materials, teaching our nation's youth, lending books, creating works, and facilitating better technologically-adapted schools. Because *amici* continuously face copyright issues, they support balanced copyright laws. Restrictive copyright laws adversely affect authors, artists, curators, archivists, historians, librarians, and readers—the creators, recorders, keepers, disseminators, and users of our culture. *Amici* submit this brief to assist the Court's understanding of the practical consequences of this unique case for large segments of the public.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the District of Columbia Circuit ("DC Circuit") erroneously held that Congress' grant of twenty additional years of copyright protection as set forth in the Copyright Term Extension Act (CTEA)[2] is constitutional.[3] The DC Circuit failed to recognize that Congress' act violates the constitutional language that empowers Congress to grant copyright protection for "limited times" as a means of

2. Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827.

3. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001).

"promoting" the arts and sciences.[4] This balance struck by the Framers consisted of giving incentives for cultural production through limited rewards to creators, while providing for an ever-growing arena of ideas and materials available for the public. Central to this balance was the public domain, whose importance has been denigrated by the enactment of the CTEA.

The public domain is a vast expanse of knowledge, experience and ideas embodied in artistic creations, including written works, audio files, movies, and photographs, as well as historical documents and archives, held in common for all people to access, enjoy, research, and use as inspiration for future creations. The public domain results from the Framers' skepticism toward monopolies and remains an integral part of the balance between the protection of works and promotion of knowledge. Historically, copyright legislation and this Court's jurisprudence have recognized the importance of the public interest as embodied in this domain of information for the people.

The CTEA cannot promote the creation of works that already exist. But it will severely diminish the ability of modern creators to generate new art and new knowledge based on existing works — as did previous generations of authors and scholars. Artists, musicians, theatrical performers, scholars, educators, librarians, authors, publishers, archivists, and historians, among others, utilize the public domain. The CTEA harms these users by limiting their access to works through prohibitively expensive licensing fees and conditional permissions for use. The CTEA also prevents the timely preservation of works, deprives scholars of research materials, and reduces funds from educational institutions, thus hampering the preservation and dissemination of information, stories, and documentation of who we are as a people.

4. U.S. Const. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for *limited Times* [emphasis added] to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). *Id.*

ARGUMENT

I. The Court Of Appeals Ignored The Original Intent Of The Framers That The Limited Monopoly Provided By Copyright Should Be Consistent With The Preservation Of A Vibrant Public Domain

The architecture of U.S. Copyright law embodies the principle that works should be available to the public after a limited time, through the avenue of the public domain. The public domain is the priceless repository of works that are ineligible for copyright, were created before copyright law existed, have had their copyrights expire, or have been freely given to the public by their authors. The Framers of the Constitution believed that dissemination of information throughout society was a cornerstone of learning, and thus of the democratic participation of citizens in the cultural and political life of the nation. They were skeptical of all restraints on the free exchange of ideas, whether by public tyranny or private monopoly.[5] Copyright operates as a monopoly for a limited time granted to the creator by the government for exclusive control over a work. This skepticism of the Framers shaped the constitutional "bargain" they struck between creators and the public: the grant of a *limited* monopoly in exchange for the subsequent deposit of works into the public domain.

The DC Circuit, in upholding the constitutionality of the Copyright Term Extension Act,[6] abandoned this constitutional

5. [E]xclusion [of publishers] from the copyright clause is probably explained by concern for the perceived potential of a booksellers' monopoly in this country, the danger of which the copyright litigation in eighteenth-century England had made manifest . . . Given the vagaries of the political process – and the historically proven skills of publishers as legislative lobbyist – the limitations were essential if the goals of copyright were to be achieved and retained without being consumed by the monopolistic practices in the book trade.

L. Ray Patterson & Stanley W. Lindberg, *Nature of Copyright* 59 (1991).

6. Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827.

bargain by ruling, in effect, that Congress has the power to use repeated extensions of the length of copyright protection for existing works (as well as new ones), transforming a limited monopoly into a virtually limitless one.[7] However, such ever-increasing periods of protection ignore the Constitution's clear directive to "Promote the progress of Science and useful Arts,"[8] and constitute a dangerous expansion of the monopoly created by copyright.

The dangers inherent in this expansion include rendering some older works inaccessible, some prohibitively expensive, and some available only upon restrictive conditions. Moreover, long terms of copyright mean that it is difficult or impossible even to determine who owns the rights that control the use of many cultural resources. This state of affairs differs dramatically from what the Framers envisioned.

Motivated by the need to promote the arts and sciences in a new society where individual freedoms to pursue and share knowledge through speech, religion, and the press were fundamental, the First Congress of the United States passed the Copyright Act of 1790, with the public domain as a central feature of its architecture.[9] This Court has in the past given deference to the acts of the First Congress when seeking enlightenment regarding Constitutional intent because many members of the First Congress were also Framers of the Constitution.[10]

7. *See supra* note 3.

8. *See supra* note 4.

9. *See* Act of May 31, 1790, ch. 15, 1 stat. 124 (repealed 1831).

10. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in the framing of that instrument . . . is contemporaneous and weighty evidence of its true meaning.' " (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)). *See also Biographical Directory of the United States Congress, 1774 to Present, available at* http://bioguide.congress.gov/biosearch/biosearch.asp (last visited Nov. 16, 2001) (noting that of the 55 original Founding Fathers, 20 were delegates at the First Congress: 10 Representatives and 10 Senators).

Cognizant of British law, the First Congress modeled the first statutory grant of copyright protection on the 1710 Statute of Anne[11] which itself reflected a deep anti-monopolistic bias.[12] Thus Congress granted fourteen years of protection with a provision for a fourteen-year renewal grant only if the author were alive.[13] Prior to the finalization of the Bill of Rights, Thomas Jefferson had proposed that it include the following language: "Monopolies may be allowed to persons for their own productions in literature, and their own inventions in the arts, for a term not exceeding ___ [sic] years, but for no longer term, and for no other purpose."[14] Although he did not specify a term, Jefferson knew that protection from unduly long copyright monopolies was a fundamental right of the people.[15] This idea was ultimately embodied in the "limited times" language of the intellectual property clause of the Constitution; like other Constitutional clauses, this one contained a grant of power to Congress with built-in restraints.[16] As Professor William Winslow Crosskey noted,

> Reading the [copyright] power, then, in the light of the Statute of Anne and then recent decisions of the English courts, it is clear that this power of Congress was enumerated in the Constitution, *for the purpose*

11. *See* An Act for the Encouragement of Learning, 1710 8 Anne ch. 19 (Eng.) [hereinafter Statute of Anne].

12. *See* Merges, Robert et al., *Intellectual Property In the New Technological Age* 346-47 (2d ed. 2000). Parliament turned its back on publishers' unrestrained monopolies by enacting the Statute of Anne. It vested the new monopoly in authors rather than publishers, and limited it to fourteen years, with a possible renewal for another fourteen. The process of obtaining rights was made complex and very strict. Another anti-monopolistic measure in the statute provided for government power to set maximum prices for copyrighted books upon application by "dissatisfied" consumers. *Id.*

13. *See* Statute of Anne, supra note 11.

14. Thomas Jefferson to James Madison, August 28, 1789, *The Papers of Thomas Jefferson*, Julian P. Boyd, ed., volume 15 (Princeton, New Jersey: Princeton University Press, 1958), p.368.

15. *Id.*

16. *See id.* at note 4.

> of expressing its limitations. And those limitations were expressed, first, because the Convention did *not* desire that Congress should have any power to grant perpetual copyrights; and, second, because it *did* desire, by restricting Congress to the creation of limited rights, to extinguish, *by plain implication of "the supreme Law of the Land,"* the perpetual rights which authors had, or were supposed by some to have, under the Common Law.[17]

This history provides additional evidence of the Framers' view of intellectual property as a creature of positive law, designed for the public benefit.[18] Likewise, the constitutional language relating to copyright protection suggests three primary goals: promotion of learning, protection of the author, and preservation of the public domain.[19] Consistent with the Framers' views, the original copyright legislation and subsequent congressional acts until the 1909 Copyright Act[20] encouraged an expansive vision of the public domain.[21]

Modern scholarship stresses the centrality of the public domain to the public purpose of copyright law.[22] Professor Jessica Litman has stated

> American ideas of freedom are bound up with a vision of information policy that counts information as social wealth owned by all. We believe we are

17. William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 486 (1953).

18. Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, U. Ill. L. Rev. 1119, 1154 (2000).

19. *See supra* note 5 at 49.

20. Pre-1909 term extensions were few and modest. *See* Timothy R. Phillips, *The Unconstitutionality of the Copyright Term Extension Act of 1998*, 72 n.27.

21. Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 Cardozo, Arts & Ent. L.J. 491, 513 (1999).

22. *See id.*

> entitled to say what we think, to think what we want, and to learn whatever we're willing to explore. Part of the information ethos in the United States is that facts and ideas cannot be owned, suppressed, censored or regulated, they are meant to be found, studied, passed along and freely traded in the "marketplace of ideas."[23]

Further, Professor Yochai Benkler sees the public domain as a vehicle for "a robust democratic discourse, of diversity of antagonistic voices, and of individual expressive autonomy."[24]

Nevertheless, congressional copyright extensions have dramatically suppressed the growth rate of the public domain.[25] The CTEA, Congress' most aggressive extension to date,[26] imposes extraordinary new restrictions on public access to copyrightable works by adding twenty years to all but a portion of one of the categories protected in the Copyright Act.[27] The DC Circuit appropriately recognized congressional authority to enact legislation that promotes creative labor through copyrights. However, the DC Circuit failed to recognize that lengthy copyright terms as embodied in the CTEA, violate the Constitutional mandate "to promote the Progress of Science and useful Arts."

Unless the court's decision is reversed, the public will be deprived of new cultural resources that depend on the availability of prior work on reasonable terms.

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23. Jessica Litman, *Digital Copyright* 1 (2001).

24. Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, (Nov. 2001) (unpublished Framing Paper, *available at* http://www.law.duke.edu/pd/papers.html) (last visited Nov. 29, 2001).

25. *See supra* note 20. *See also* http://www.law.asu.esu/homePages/Karjalaopposingcopyrightexpansion/constitutionality/phillips02.html (last visited Oct. 3, 2001).

26. *See supra* note 20.

27. *See* Copyright Act, 17 U.S.C. § 303(a) (2000). The one exception is for the attributed works created but not copyrighted before 1978.

II. The DC Circuit's Decision Harms The Public Interest In Copyright Law By Minimizing The Public Domain

The DC Circuit ignored the long line of Supreme Court cases that affirm the primacy of the public interest in copyright law.[28] In particular, it overlooked the oft-stated view of this Court as set forth in *Twentieth Century Music Corporation v. Aiken*:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright term required by the Constitution, reflects a balance of competing claims upon the public interest: creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.[29]

The public domain is an essential component of a copyright system that fulfills the public interest. In particular, it helps to secure the "broad public availability" of information to which this Court referred in *Aiken*. Restrictions on the growth of the public domain directly and adversely affect that public interest in a variety of ways.

Although the number of creators and creations has grown over time, every term extension has created a period of "zero

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28. *See Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expressions for the good of the public"); *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors but to 'promote the Progress of Science and useful Arts' "); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration"); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors").

29. *Twentieth Century Music Group v. Aiken*, 422 U.S. 151, 156 (1975).

growth" in the public domain as shown in chart i.[30] The resulting decline in the rate at which this resource accumulates is unwarranted in a nation that cherishes the promotion of creative and scientific works for the betterment of its people.

The public domain benefits the public by providing inexpensive and ready access to many works of literary, scientific, historic, social and artistic importance, and by supporting innovation and the expansion of knowledge. Works within the public domain are the foundation for new creativity: creators rarely produce original works isolated from cultural tradition, but in every era authors have drawn extensively on public domain materials.[31] While all works are not pastiche, even the most innovative incorporate previous ideas and expressions.[32] For example, modern dance pioneer Martha Graham frequently expressed her indebtedness to public domain materials that encouraged her creative process and fostered acclaimed new works.[33]

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30. *See* appendix I.

31. For as Justice Story explained,

> [i]n truth, in literature, in science and in art, there are, and can be, few if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

Campbell v. Acuff-Rose, 510 U.S. 569, 575 (1994) (quoting Emerson v. Davies, 8. F. Cas. 615, 619 (1845)).

32. Elton Fukumoto, *The Author Effect After the "Death of the Author" Copyright in a Post-Modern Age*, 72 Wash. L. Rev. 903, 933 (1997) ("Historically a recognition existed that imitation, borrowing, and copying was an inevitable part of creating works of art, but only in the post Romantic period did such artistic appropriation constitute copyright infringement . . ."). *Id.*

33. Siva Vaidhyanathan, *Copyrights and Copywrongs* 186 (2001) (describing how Graham was inspired by the Declaration of Independence, Greek mythology, African culture, and Native American legends).

Similarly, the Walt Disney Company has used many stories and previous works from the public domain in creating its internationally recognized animated movies. The old tales of *Snow White and the Seven Dwarves*, *Cinderella*, and *Sleeping Beauty*, as well as modern works of authorship such as *Pinocchio*, the *Jungle Book*, and the *Hunchback of Notre Dame*, were public domain works utilized by Disney to produce some of American cinema's most memorable icons.[34]

Public domain status also gives the public new opportunities to appreciate older works. In 1993 Willa Cather's *My Antonia* entered the public domain and in 1994 seven new editions appeared (costing from $2 to $24) making the story available to many more people than had previously read it.[35] Likewise, the children's book *The Velveteen Rabbit* became a widely popular classic once it passed into the public domain. Although the original version is still in print, newly illustrated versions that

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34. *See* Heidi Anne Heiner, *Sur La Lune Annotated Fairy Tales* (Oct. 14, 2000) *at* http://members.aol.com/rocketrder/frytales/snowhite/history.htm (last visited Nov. 18, 2001) (relating that *Snow White* was originally recorded by the Grimm brothers in 1818); *see* Tiffany Jensen, *Cinderella The Evolution of a Story: An Examination of the Cultural Significance of Oral History*, *available at* http://www.usu.edu /anthro/origins_of_writing/cinderella (last visited Nov. 18, 2001) (noting that *Cinderella* and *Sleeping Beauty* are both direct representatives of "Histoires ou Contes Du Temps Passe" [Tales of Times Past] by Charles Perrault, 1697); *see* Bob's World Literature Page *at* http://www.intac.com/~rfrone/Lit/1106/1106-00.htm (last visited Nov 18, 2001) (explaining that *Pinocchio* was originally created in 1883 by Carlo Collodi, and released as a movie in 1940 by Disney). *Jungle Book* was written in 1894 by Rudyard Kipling (who died in 1936) but which, had CTEA's rules applied, would not have been available for use by Disney until 2007, 40 years after Disney released its version as a movie, *at* http://www.ricochet-jeunes.org/eng/biblio/author/kipling.html (last visited Nov. 18, 2001); and the *Hunchback of Notre Dame* appeared in 1831, *at* http://www.kirjasto.sci.fi/vhugo.htm, (last visited Nov. 18, 2001).

35. *See* S. Rep. No. 104-315 at 37 (1996) (Statement of Sen. Herb Kohl).

creatively interpret the story have been released, and seven different editions are now listed in *Books in Print*.[36]

Generally, the CTEA extends the term (and therefore the economic reward) of copyright protection, creating disturbing consequences. Users must incur further costs for licensing fees (which effectively limit the amount of material available for public use), while many creators and scholars face costly impediments to identifying and locating rights holders for older, lesser-known works, which may entail multiple ownership tiers. Even the necessity of *seeking* permission to use such works may be prohibitive because of the high search and negotiation costs involved. The CTEA, under certain circumstances, may subject the public and institutions that disseminate information to additional expense and burdens with very uncertain benefits.[37] As a consequence, institutions large and small may forgo use of those works. For example, the University of Texas, apparently conscious of potential liability, prohibits students, faculty or staff from using copyrighted works if permission cannot be obtained, even if a good faith effort is made to secure such permission, and even if a persuasive fair use argument may be made.[38]

Specifically, the CTEA imposes a twenty-year moratorium on works entering the public domain.[39] Were it not for the CTEA,

36. *See* Horn Book Inc. *at* http://www.hbook.com/exhibit/editorial_eh.html (last visited Dec. 4, 2001).

37. *Amici* are well aware that the CTEA provides an exemption in § 108(h) of Title 17 U.S.C. (Copyright Act) for librarians and archivists to have access to a limited group of works within the last twenty years of a work's copyright protection term. However, use of the exemption requires compliance with various conditions.

38. University of Texas policy, *available at* http://www3.utsystem.edu/ogc/IntellectualProperty/cprtpol.htm (last visited Dec. 4, 2001).

39. *See supra* note 6. The only exception to this proposition is represented by unpublished works whose authors died prior to 1933; if not published by the end of 2002, these works will become generally available to the public. Copyright Act, 17 U.S.C. § 303(a) 2000.

the decades from 1998 to 2018 would have seen the entry into the public domain of a wide variety of works published in the United States between 1923 and 1943, in addition to many unpublished works by authors who died prior to 1968.[40] The following examples illustrate the harms flowing from the general phenomenon of the erosion of the public domain by copyright extension.

1. Copyright Term Extension Harms Disseminators Of Information

Primary disseminators of information include educators, archivists and librarians. These individuals and their organizations serve the public without commercial gain, seeking only to benefit users through promoting accessible information, exposure to arts and sciences, and cultural enrichment, drawing in part on the public domain.

a. Educators and librarians:

Educators face many difficulties obtaining works by important authors at reasonable prices. The CTEA affects educational enterprises by adding to the cost of books that are commonly assigned for class use, such as *The Great Gatsby* and *A Farewell to Arms*.[41]

Copyright term extension also inhibits educators' efforts to provide students with texts in electronic form. Electronic teaching tools have become an important resource for educators, as evidenced by the success of The Dickens Web, a successful

40. *Id.* at § 303 and 304(a). 304(a)-terms based on publication and 303-unpublished works, providing an alternative basis for calculating term (life of author or until the end of 2002, whichever is longer).

41. *See* S. Rep. No. 104-315 at 34 (1996) (Statement of Sen. Hank Brown). In 1996 Bantam Books conducted a study and determined that almost 12 million literary classics are sold each year to high schools and colleges. One analysis concluded that if copyright were extended twenty years, consumers including schools and students would pay out an additional $345 million in royalties. *Id.* at 34. *See also* S. Rep. No. 104–315 at 37 (1996) (Statement of Sen. Herb Kohl). Moreover, firms like Scribners, publisher of Fitzgerald and Hemingway, long charged their educational customers high prices for reprints of modern classics. *Id.* at 37.

hypertextual research and educational site detailing the world of Charles Dickens.[42] The creation of such pedagogical tools becomes difficult or impossible if the information needed remains under copyright protection. Thus, copyright concerns will continue to inhibit the development of similar resources for the study of twentieth-century culture.

2. Copyright Term Extension Harms Creative Users Of The Public Domain

Copyright term extension adversely affects not just institutional disseminators, but also a wide variety of creative users of public domain material. These include theatrical and musical performers, authors, publishers, and film scholars.

a. Theatrical and musical performers:

Without the public domain, every theater in the nation, be it a high school or the Kennedy Center, would first need to obtain permission from Shakespeare's heirs to perform any work by Shakespeare. In the future, under the current regime of repeated copyright term extension, this requirement of securing permission may be the case for the plays of Tennessee Williams and other twentieth-century playwrights for many decades to come. Term extension poses additional dilemmas for would-be performers of dramatic works. For example, a recently published play, *Painting Churches*, includes the following direction to potential licensees: "Note: Permission to produce *Painting Churches* does not include permission to use this song ['Nothing Could Be Finer'], which ought to be procured from the copyright owner;" and on another page, "Note: This song is still under copyright protection. Permission to use it in productions of *Painting Churches* ought to be procured from the copyright owner."[43] The potential producer must identify, locate, and

42. *See* http://www.eastgate.com/catalog/Dickens.html (last visited Nov. 27, 2001) (offering educational software package that provides electronically linked text and images that interact and provide different pathways of information for the user to follow).

43. Tina Howe, *Painting Churches*, 11,35 (Samuel French, Inc. 1982) 1984.

receive permission from unnamed copyright owners, a costly and burdensome exercise.

Today, many regional theaters forgo performing classic American musicals because producers cannot afford the necessary licensing fees.[44] Even if they can, the copyright holder may restrict the interpretation of the work to reflect contemporary times and issues. For example, theaters are barred by the Gershwin Family Trust from producing *Porgy and Bess* (1934) with casts including white performers.[45] Permission to perform Rodgers and Hammerstein works is also subject to strict conditions.[46] Copyright extension reduces opportunities for new artists to expand on or reinterpret materials that would otherwise have been part of the public domain.

Merely singing songs in the most innocent of situations is touched by copyright extension. For example, restaurants where waiters serenade customers with "Happy Birthday" (in which the copyright now will not expire until at least 2030)[47] might be forced to pay performance rights fees to copyright holders.[48]

b. Authors and publishers:

Term extension yields other examples of results completely disconnected from the incentive rationale for copyright protection. In one instance, a university press required the author of a book on city planning to pursue permissions for use of a

44. *See supra* note 44 at 37.

45. Gail Russell Chaddock, *Public Interest v. Private Rights*, Chicago Sun-Times, June 21, 1998, at 31.

46. Rodgers and Hammerstein Theatre Library, Below are Some Questions Commonly Asked By Theatre Library Customers . . . , *at* http://www.rnh.com/theatre/tlnews/qanda_test.html (last visited Nov. 18, 2001).

47. *"Happy Birthday" Song Sold to Warner Communications*, *Time*, Jan. 2, 1989, at 88 (describing how Warner Communications bought the copyright to "Happy Birthday to You" for an estimated price of $25 million, stating that "Warner is equipped with computer capacity and other resources to track uses;" at the time Warner purchased the song, the expected copyright expiration was 2010).

48. *See supra* note 45.

previously unpublished photograph of Charles Mulford Robinson, who died in 1917. The photographer's name was unknown, and securing permission was impossible.[49] In another instance, a television network required permission to use a similarly unpublished 1912 photograph of Jim Thorpe running on the deck of a ship en route to the Stockholm Olympics. The photograph, containing no indication of the photographer, established no clear evidence of ownership, and thus a clear path for securing permission could not be established.[50] Even when creators can surmount the costs of permissions and invest the complicated and time-consuming effort, this requirement creates enormous burdens for scholarship, documentary filmmakers and authors.

In the domain of fiction, as well, excessive copyright can restrict, rather than promote, creative production. A notorious recent example of attempted private censorship utilizing copyright law is the case of Alice Randall's *The Wind Done Gone*. This work, offering a revisionist portrait of the antebellum South, is a creative and critical commentary on Margaret Mitchell's *Gone With the Wind* in the form of the first-person narrative of Scarlett O'Hara's black half-sister.[51] Only because of copyright term extension could the Mitchell estate sue to suppress Randall's work. At the time of its first publication, *Gone With the Wind* was due to enter the public domain no later than 1992. However, because of successive term extensions, this work will not be freely available for public use until 2031 (presuming no further extensions by Congress).[52]

49. Personal communication with William J. Maher, University Archivist, Univ. Ill. at Urbana Champaign, Oct. 31, 2001.

50. *Id.*

51. *See Suntrust Bank v. Houghton Mifflin Co.*, No. 01-12200, 11th Cir. LEXIS at 1; 60 U.S.P.Q. 2d (BNA) 1225 (2001). Randall, an African-American woman, was disturbed by the characterization of blacks in the novel.

52. *See* Lawrence Lessig, *Let the Stories Go*, April 30, 2001, N.Y. Times op-ed. http://www.nytimes.com/2001/04/30/opinion/30LESS.html (last visited Oct. 25, 2001).

3. Copyright Term Extension Harms Scholarly Institutions And Scholars Who Utilize The Public Domain

a. Archivists and historians:

Those who preserve and interpret history face similar problems. For example, important documents relating to World Wars I and II remain and will continue to remain inaccessible. Dwight D. Eisenhower died in 1969, so the copyright in his non-presidential papers will not expire until the end of 2039, restricting use of his letters ruminating on the conduct of World War II until nearly a century after that war was fought. Meanwhile, Eisenhower's thoughts on his service in World War I cannot be fully utilized in historical scholarship without costs and/or restrictions until more than 121 years after the 1918 Armistice.[53]

Copyright term extensions can severely limit the publication of scholarly works, as a recent article on the Civil War submitted to a historical journal demonstrates.[54] The author used compelling excerpts from soldiers' diaries and letters to compare the perceptions and sentiments of western soldiers with those of their eastern counterparts. The journal would not accept the article unless the researcher obtained signed permissions from the families (and other copyright holders if applicable) of every soldier who was quoted, since the materials could conceivably still enjoy copyright protection. The last Civil War veteran died in 1959; thus, under the CTEA, the copyright on some previously unpublished letters could endure until 2030.[55] Because archives

53. *See* DWIGHT D. EISENHOWER: Papers, Pre-Presidential, 1916-52 Finding Aid, *available at* http://www.eisenhower.utexas.edu/listofholdingshtml/listofholdingsE/EDDPREPRESIDENTIAL/1652.pdf, (last visited Dec. 6, 2001). The guide notes that "Literary rights in the writings of Dwight D. Eisenhower are held by his literary executor, John S.D. Eisenhower." *Id.*

54. E-mail from Peter Hirtle, Co-Director Cornell Institute for Digital Collections, to Peter Jaszi, Counsel of Record (Nov. 29, 2001).

55. Civil War correspondence published in even a limited edition before 2003 would enjoy protection until 2047, a term extended by the CTEA. *Id.*

include items of mixed and unknown provenance, the task of clearing such copyrights may involve genealogical and probate inquiries dwarfing the scope of the original research effort.[56] The journal's reluctance to gamble on a potential copyright infringement action prevented the publication of this important article.[57]

Similarly, archivists desiring to make digital copies of Civil War materials available to schools and universities to further public understanding are thwarted in their efforts by excessive copyright terms.[58] As Roy Rosenzweig noted in a recent article in the Journal of American History, "[f]or historians, copyright protection has redlined . . . much twentieth-century history . . ."[59]

56. In some cases the soldier's family may have donated or sold the letters and diaries to a repository, while other documents and letters may have been originally found in old houses, furniture, or suitcases by people with no direct connection to the writers. Ownership of a physical letter does not necessarily carry with it the right to use the contents, 17 U.S.C. § 303.

57. Had this incident occurred in Canada, the author would only have had to make a documented good faith effort to locate the copyright owners and submit the documentation of the unsuccessful search to the Copyright Board. In cases where a copyright holder cannot be located, the Board is authorized by Canada's Copyright Act to grant a license. License fees are held in trust for missing rights holders who may claim royalties up to 5 years after the expiration of a Board-issued license as codified in § 77 of the Canadian Copyright Act, R.S.C., C-30, S.1., *available at* http://www.cancopy.com (last visited Nov. 20, 2001). U.S. law contains no such provision. *Id. See also* http://www.cb-cda.gc.ca/info/act-e.html#rid-33225 (last visited Dec. 6, 2001).

58. Peter B. Hirtle, *Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Use*. Interdisciplinary Conference On The Impact Of Technological Change On The Creation, Dissemination, And Protections Of Intellectual Property, The Ohio State University College of Law, Columbus, OH. March 8-10, 2001. Forthcoming in the *Journal of the Copyright Society*. Preliminary draft version for conference attendees *available at* http://cidc.library.cornell.edu/copyright/Hirtle_OSU_paper.pdf, (last visited Nov. 22, 2001).

59. Roy Rosenzweig, *The Road to Xanadu: Public and Private Pathways on the History Web*, 88 J. Am. Hist. 2, (2001).

If copyright term extension survives constitutional challenge, opportunities for new artists to expand on the culture of the past will be fewer, and citizens will miss opportunities to be exposed to, and enriched by, primary historical documents and knowledge.

b. Film scholars and archivists:

A film scholar and author of the book *Film, Form, & Culture*, a textbook with an accompanying CD-ROM, chronicles the difficulty and cost of identifying and obtaining permission for use of films from the twentieth century. The Second Edition increased in cost when the author included clips from two "B" gangster films of the late 1940's and 50's, for which the copyright owner demanded $2,000 for 120 seconds of clips. This same author also could not use any clips by Disney-owned works, which are not licensed for CD-ROM use as a general policy.[60] Although a modified version of *Film, Form, and Culture* was eventually published, the need to obtain permission may chill similar publications for decades to come, since under the CTEA many pre-1960 American films will be protected well into the twenty-first century.

Although the CTEA is sometimes characterized as promoting the preservation of America's film heritage, the reality is otherwise.[61] Thousands of old movies sit on shelves deteriorating because the companies that hold the copyrights make no efforts to restore them or make them available, while their copyright status prevents others from preserving such works.[62] By the time many of these works are finally available to enter the public domain, prints and negatives will have physically disintegrated. These endangered works include not

60. Telephone interview with Robert Kolker, Chair, School of Literature, Communication, and Culture, Ivan Allen College, Georgia Institute of Technology (October 16, 2001).

61. *See supra* note 41 at 30.

62. Jesse Walker, *Copy Catfight*, Reason On Line (March 2000) *available at* http://www.reason. com/0003/fe.jw.copy.html, (last visited Dec. 5, 2001).

only film "classics," but also industrial films, forgotten examples of silent cinema, footage from uncompleted projects (such as Orson Welles' *Don Quixote*), and kinescopes of programs from the "golden age" of television.[63]

CONCLUSION

Unless the decision of the DC Circuit is reversed, the CTEA and subsequent extensions of copyright terms will continue to impede the growth of the public domain. *Amici* do not argue against licensing fees as an appropriate means of rewarding authors and creators, nor do we suggest that we are prevented from invoking the fair use doctrine in appropriate situations. However, the practical result of copyright term extension, by maintaining unnecessary barriers to the accessibility of information, diminishes the ability of the public to be educated, to be entertained, and to engage in debate. Through excessive copyright extension, copyright owners will continue to restrict access to and exert censorial control over millions of works, thereby chilling discourse and cultural development long after incentives for production have ceased to operate.[64] The Framers of our Constitution envisioned a very different role for copyrights.

Every member of society, from the toddler who hears a fable for the first time to the archivist who meticulously inventories the wealth of information present on the World Wide Web, has the constitutional right to use and receive information. *Amici* urge this Court to recognize the breadth of the harms the public will suffer if the CTEA is not found unconstitutional and to reaffirm the Framer's intent for Congress to promote the public's interest through balanced copyright law.

For the foregoing reasons, this Court should grant the writ of certiorari and the judgment of the DC Circuit should be vacated and reversed.

---

63. *Id.*

64. Neil Weinstock Netanel, *Copyright and a Democratic Society*, 106 Yale. L.J. 283, 285 (1996).

Respectfully submitted,

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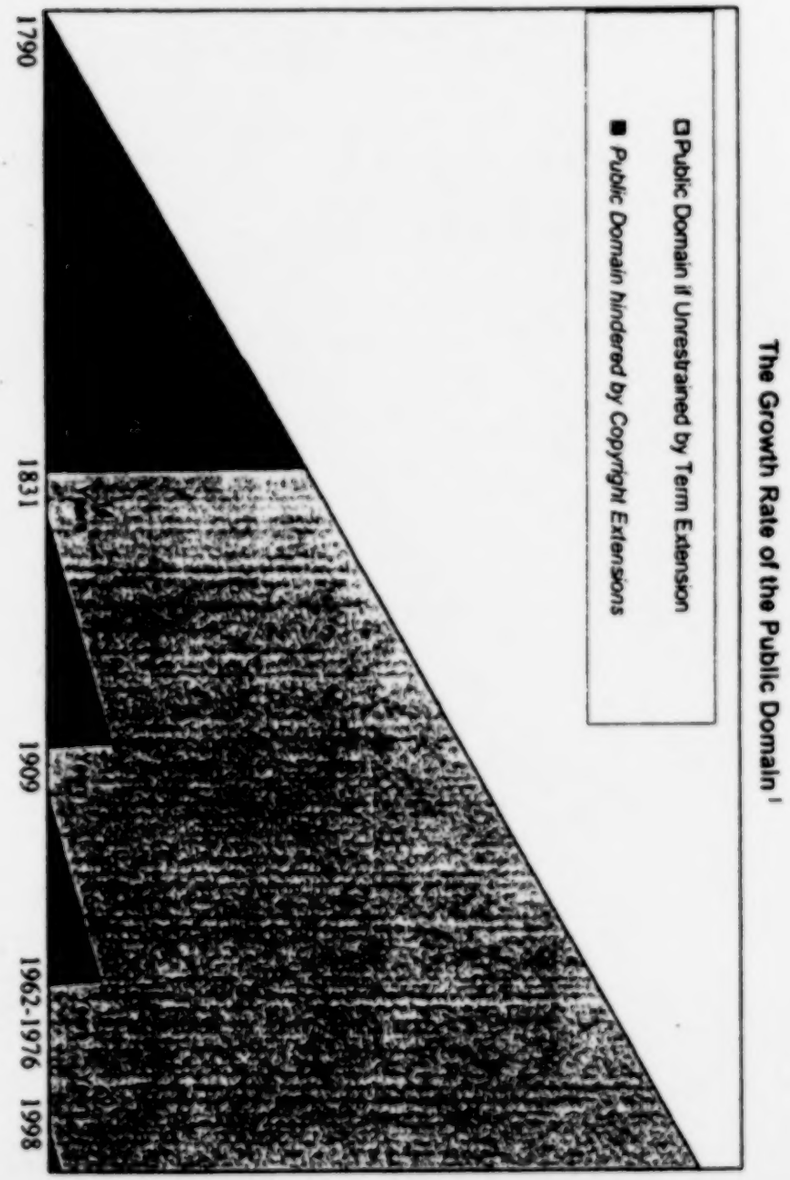
APPENDIX

APPENDIX I — THE GROWTH RATE OF THE PUBLIC DOMAIN



1. This chart is a visual representation of *amici's* understanding of the decline of the growth of public domain as a result of repeated copyright term extensions.

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Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, Attorney General,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE PROGRESSIVE INTELLECTUAL PROPERTY LAW ASSOCIATION AND THE UNION FOR THE PUBLIC DOMAIN IN PARTIAL SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE**

Amici are two non-profit public-interest organizations. The Progressive Intellectual Property Law Association (PIPLA), is a Cleveland organization whose membership consists of lawyers, law students, professionals, and laypeople interested in protecting and supporting the public interest in intellectual property concerns.[1] PIPLA was founded in 1990, in response to the AIDS crisis and the relationship between pharmaceutical patents and the public interest. PIPLA has since become dedicated to the more general issue of the relationship between intellectual property and the public interest. Its members have offered testimony before the Patent and Trademark Office and have supplied advisory and support services on various intellectual property issues. This is PIPLA's first *amicus* appearance.

The Union for the Public Domain (UPD), located in Washington, D.C., is an independent membership organization with the goal of protecting and enhancing the public domain in intellectual property matters. Founded in 1996, UPD is comprised of computer and software

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* Consent of all parties has been granted to file this brief of *Amici Curiae* in partial support of petitioners. Letters of Consent have been filed with the Clerk of this Court. No counsel for either party had any role in authoring the brief, and no person other than the named *amici* and their counsel made any monetary contributions to the preparation and submission of this brief.

[1] Several law student members of PIPLA helped to prepare this amicus brief: Marquetta Bryan, Jay Crook, Michael Dolan, Jr., Lisa Johnson, Angela Marshall, Edward R. Pekarek, Dawn Snyder, and Peter D. Traska.

experts, small businesses, students, professors, lawyers, librarians, and concerned Americans who seek common ground in order to provide a strong voice for the public's rights in intellectual property matters.

Amici are deeply concerned with both the effects of the Copyright Term Extension Act[2] (hereinafter referred to as the "Bono Act") on the public domain as well as with the disturbing circumstances under which it was created. This *Amici Curiae* brief is filed because of concern that the true policy of the Copyright Clause has been perverted. This distortion almost exclusively surrounds the retroactive portion of the bill. These *amici* believe that it is only the failure to distinguish retrospective from prospective term extensions when considering their respective constitutional bases that has kept the courts below from reaching the correct result in this case.

SUMMARY OF ARGUMENT

This case affords this Court a unique opportunity to do more by doing less. Judicial restraint generally impels this Court to decide only essential constitutional issues. Here the issues are uniquely situated so that the decision of only one issue – that of retrospective extensions – will do far more than merely defer the remaining issue of

[2] *The Sonny Bono Copyright Term Extension Act*, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The Act retroactively increased the term of protection for existing copyright from seventy-five to ninety-five years for works-for-hire, and from life plus fifty to life plus seventy years for all other works, and did the same prospectively for future works.

prospective extensions, but will render that issue permanently beyond any need of judicial review.

If this Court decides that retrospective extensions are unconstitutional, it will not only be able to avoid deciding the other issue today of whether a prospective extension violates the "limited times" Constitutional provision[3] but will likely never have to decide that issue. Prospective copyright term extensions are reviewable only with great difficulty. Fortunately, however, the primary reason Congress has been urged to extend copyright terms is to obtain retrospective, not prospective, extension. By seizing this opportunity to declare only retrospective copyright extensions unconstitutional, this Court can remedy the distortion of the political process effected by its proponents. Congress will then be free to balance the competing concerns of incentives for authorship and a rich public domain, unburdened from constitutionally suspect demands that are inconsistent with the design of the Copyright Clause.

ARGUMENT

I. JUDICIAL RESTRAINT MILITATES AGAINST REVIEWING MORE OF A STATUTE THAN IS NECESSARY.

This Court has consistently placed a premium on restraint: "If there is one doctrine more deeply rooted

[3] U.S. CONST. art. I, § 8, cl. 8.

than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."[4] Moreover, this Court has underlined the fact that it is often not so much a question of refusing to decide but rather of deferring. "A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."[5] This Court avoids intrusion into the legislative process as much as possible. As the decision below asserts, "a court should avoid, not seek out, a constitutional issue the resolution of which is not essential to the disposition of the case before it."[6] These *amici* contend that the issue of copyright extension offers this Court a unique opportunity to choose the least intrusive approach, while at the same time resolving all of the larger issues involved in this profoundly important question.

Not only is this approach the most prudential, but it also reflects the same deferential restraint that this Court routinely applies to other areas. For instance, this Court declines review of federal questions decided by state courts resting on independent and adequate state

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[4] *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

[5] *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). This Court recently reiterated that logic: "[i]t is true that we have often stressed the importance of avoiding the premature adjudication of constitutional questions." *Clinton v. Jones*, 520 U.S. 681, 690 n. 11 (1997).

[6] *Eldred v. Reno*, 239 F.3d 372, 378 (D.C.Cir. 2001).

grounds.[7] The political question doctrine is another example of this restraint.[8] Similarly, this Court avoids constitutional bases where statutory construction serves the same goal because it preserves the delicate balance of power between the judiciary and legislative branches.[9] This Court's doctrines requiring cases and controversies, refusing moot questions, granting *certiorari* with selectivity, and most critical to the correct disposition of this case, severability, all serve the goals of preserving judicial resources and minimizing intrusion.

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[7] *Murdock v. City of Memphis*, 87 U.S. 590 (1874); *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965).

[8] *Baker v. Carr*, 369 U.S. 186 (1962). The Supreme Court has stated that, "[a]n Art. III court's resolution of a question that is 'political' in character can create far more disruption among the three co-equal branches of Government than the resolution of a question presented in a moot controversy." *Goldwater v. Carter*, 444 U.S. 996, 1005-06 (1979). Among the factors provided by this Court to discover whether a case involves a political question is when there are "a lack of judicially discoverable and manageable standards for resolving it," *Baker v. Carr*, 369 U.S. at 217. This certainly evokes the kind of difficulty posed by the question of appropriate copyright terms, although these *amici* do not believe this case involves a truly political question.

[9] It is settled doctrine that the Supreme Court "will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided." *U.S. v. Clark*, 445 U.S. 23, 27 (1980). This maxim of construing acts of Congress to avoid Constitutional questions is based both on a desire to avoid premature adjudication of constitutional issues, and on the belief that in areas where legislation might intrude on constitutional guarantees, Congress would err on the side of those constitutional liberties. *Regan v. Time, Inc.*, 468 U.S. 641, 697 (1984).

Rather than constraining this Court, the principle of judicial restraint underlying all the doctrines discussed above can lead this Court to a resolution of this case that establishes clear copyright doctrine and restores the precise Constitutional balance demanded by the Copyright Clause. Although copyright terms are not unreviewable, it is primarily a Congressional task to discern the prospective copyright terms that best promote progress. A court would be hard pressed to decide *ipso facto* whether seventy-five or ninety-five years is the optimum term to balance the societal need for access to the public domain with that of a sufficient incentive for authors to create. Of course, at some point Congress might be urged to enact a coypright term which for all practical purposes is unlimited and therefore violates the Copyright Clause. However, there is no need whatsoever to conduct that review in this case. If Congress is firmly and unequivocally prohibited from hereafter granting retrospective extensions, these *amici* submit that it will not likely have cause to violate the Constitution again.

II. BUT FOR RETROSPECTIVE EXTENSION THERE WOULD HAVE BEEN NO CONGRESSIONAL INTEREST IN TERM EXTENSION

The Bono Act's legislative history reveals the unarguable truth that, were it not for retrospective extension, no extension would have been enacted at all.[10] That is,

[10] A detailed summary of how all the proponents of copyright term extension were interested solely in retrospective extension can be found in, Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"* 52 FLA. L. REV. 989, 996-1002 (2000).

although the resulting extension was for both retrospective and prospective terms, only retrospective extension motivated those supporting the Bono Act. And this makes economic, although certainly not constitutional, sense.

Economic realities explain that there is simply not enough present value in any prospective extension to justify serious interest in such extensions and, indeed, that is why those benefiting from retrospective extension were the chief proponents of extension in the first place. The present value of the additional twenty years of copyright exclusivity granted by prospective extension adds less than a microscopic one-tenth of one per cent to the expected cash flow during an initial fifty year term.[11] It defies logic to conclude that any sound business practice would include deploying substantial resources to secure such a poor investment. Compare this, however, to the immediate returns of billions of dollars of profit guaranteed by retrospective extension[12] and it becomes obvious how the failure to impose constitutional limits upon retrospective extensions distorts the democratic process.

These *amici* do not deny that there are other reasons that copyright term extension might be demanded – in this case, for instance, advocates of global harmonization

[11] Dean Hal R. Varian Aff. at 8-9, Appendix to the record filed in the appeal from the United States District Court for the District of Columbia at A 64-67.

[12] The Disney investment in the "Winnie the Pooh" characters will apparently yield more than one billion dollars per year, for which Disney paid about $350 million. *Disney Buys the Rights to Winnie the Pooh*, N.Y. TIMES, March 5, 2001, at C12.

argued that the difference between U.S. terms and some (but, notably, hardly all) foreign terms meant that U.S. authors enjoyed less exclusivity than others overseas.[13] The Court of Appeals concluded that the Bono Act achieved harmonization with European Union copyright standards and that such standardization of terms is a valid exercise of an enumerated Congressional power,[14] without questioning whether there was a less intrusive way of accomplishing this without constitutional damage. However, the argument that harmonization required retrospective extension is simply wrong, because prospective extension can accomplish the same result, although over a longer period of time.

While these *amici* do not accept that such foreign considerations should dictate U.S. copyright interests, they nevertheless believe that Congress is most competent to decide that issue if confined to a constitutionally valid prospective treatment. Congress must have the

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[13] The reasons for this go beyond the interests and arguments of these *amici*, but an international copyright law doctrine, the rule of the shorter term, allows countries to apply the foreign country term to foreign authors, where that term is shorter than the protecting country. *Berne Convention for the Protection of Literary and Artistic Works*, Art. 7(8), Sept. 9, 1886, and later revisions. The rule of the shorter term is actually an exception to the general international copyright law doctrine of national treatment which would otherwise give foreigners all the benefits that nationals receive. Prior to the present extension, because some countries applied a lifetime plus seventy-year term, American works received only their lifetime plus fifty-year term under the rule of the shorter term. EU Directive of Oct. 29, 1993, 93/98/EEC, O.J. 1993 No.L 290.

[14] *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001).

opportunity to assess that question in a fair and impartial democratic manner, untainted by the arguably illegitimate lobbying demands of corporate advocates for unconstitutional retrospective extension. Should Congress be convinced that longer prospective terms are desirable in furtherance of the progress of expressive works and without the specter of monied lobbying interests, it can assuredly be trusted to decide the matter. And notably, if Congress decides to reject such an extension, it could have important global ramifications such as encouraging foreign countries to re-examine the merits of grossly extended copyright terms.

It is difficult to exaggerate the mischief caused by those seeking retroactive extension. One of the most influential supporters of the Bono Act was the Walt Disney Corp., which had acquired the rights to the "Winnie the Pooh" characters.[15] In its purchase agreement, Disney made its obligations contingent upon the successful passage of the Bono Act retrospective extension, much like a potential home buyer who includes a mortgage financing contingency clause. Treating Congress as if it were one's private banker vividly demonstrates the growing hazards of allowing copyright terms to escape their constitutional bounds. This potential mischief was illustrated in its most extreme form when Sonny Bono's widow (while serving the remainder of his term), stated upon presentation of the bill:

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[15] Jon M. Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 600 (1999).

> Actually, Sonny wanted copyright to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all ways available to us. As you know, there is also Jack Valenti's proposal to last forever less one day. Perhaps the committee may look at that next Congress.[16]

These *amici* recognize that retroactive extensions are not unusual, but they do not believe that should deter this Court from finding them constitutionally flawed. It is true that, as the Court of Appeals noted, every past copyright term extension has extended subsisting as well as future terms, a progression which these *amici* believe has now reached proportions which demand the present review.[17] When the 1976 Copyright Act was enacted, the terms of works under the earlier 1909 Act were all extended from a maximum of fifty-six to the seventy-five years that the new Act applied to all non-works-for-hire.[18] Retrospective extensions, although on a smaller scale, also occur in patent law. The extension of existing patent terms by the passage of private legislative bills has become somewhat controversial.[19] And, of course, many of the same arguments about the Bono Act would certainly apply to those private bills: the drugs have already

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[16] 144 CONG. REC. H9951 (daily ed. Oct. 7, 1998) (remarks of Rep. Bono).

[17] *Eldred v. Reno*, 239 F.3d 372, 374 and 379 (D.C. Cir. 2001).

[18] 17 U.S.C.A. §§ 303 and 304.

[19] *See*, Robert Patrick Merges and Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45 (2000).

been invented, for instance, and an increased term does not serve to promote progress with respect to an already-invented drug.

However, despite the similarities, previous copyright extensions and the private bills extending patent terms are markedly different from the Bono Act, at least for purposes of this appeal. It has been over a quarter century since the 1976 Act was enacted. Unlike the Bono Act, many have relied on those extensions and, fortunately, those terms are either on the cusp of expiration or have already expired, rendering the question essentially moot. By the same token, extensions of patent terms for at least some pharmaceuticals are often sought because of other very different, and arguably legitimate circumstances (e.g., FDA approval). Thus, there is no reason to assume, without more, that invalidating the Bono Act would automatically invalidate private patent extension bills. Surely, at a minimum, that question can await its own hearing.

If Congress is afforded the chance to consider the question of prospective term extensions unsullied by illegitimate pressures for retroactive extension, it may actually decide to shorten rather than extend copyright terms. This is especially true in a world where functional works such as computer programs have only recently been afforded copyright protection, and where such works routinely and predictably become antiquated well prior to the end of their copyright terms.[20]

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[20] Computer software becomes obsolete within ten years and many programs must be upgraded approximately every three years. *See*, Charles N. Faerber, *Book Versus Byte: The Prospects and Desirability of a Paperless Society*, 17 J. MARSHALL J.

III. THIS CASE INVOLVES ONLY ONE QUESTION THAT DEMANDS REVIEW: RETROSPECTIVE TERM EXTENSION

Petitioners seek to have both aspects of the Bono Act, retrospective and prospective extension, declared unconstitutional. These *amici* believe that certain unique features of this case would allow this Court to effectively address both issues by directly addressing only one – retrospective extension.

This case therefore presents a truly unique opportunity to exercise judicial review and judicial restraint at the same time, in a perfectly balanced symbiotic manner. The dynamic between prospective and retrospective copyright term extensions presents an ideal situation where this Court can declare part of a statute unconstitutional while at the same time it will increase the autonomy and legitimacy of Congress to decide the remaining issue.

Retrospective extension cannot possibly serve to promote the progress of expressive original works of authorship by offering the incentive of a term increase to an

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COMPUTER & INFO. L. 797, 813 (Spring 1999). Compare the *Semiconductor Chip Protection Act* where Congress has recognized the volatility and the shorter usefulness of the semiconductor chip mask works by choosing a ten-year protection period over copyright's substantially larger periods. 17 U.S.C. § 904(b). *See also*, Leo J. Raskind, *Symposium: The Future of Software Protection: The Uncertain Case for Special Legislation Protecting Computer Software*, 47 U. PITT. L. REV. 1131, 1134 (Summer 1986), which argues a term more comparable to the *Semiconductor Chip Protection Act* should be applied to software protection.

author, or his or her assigns, *post hoc*.[21] Prospective extension, however, is a considerably more difficult matter because it is not so much the promotion of progress, but rather the "limited times" portion of the Copyright Clause that is at issue. Both the District Court and Court of Appeals faced this problem: how long is too long? Both courts seem to have answered to a greater or lesser degree that they are uncertain, with the Court of Appeals ostensibly suggesting that the matter was essentially not justiciable and that the Copyright Clause offers no cognizable legal limits whatsoever.[22]

These *amici* believe that it is the very difficulty in determining what is a "limited time" that has needlessly

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[21] The logic used by the Court of Appeals and Congress to justify the *Bono Act* is inconsistent with the decision of this Court in *U.S. v. Lopez*, 514 U.S. 549 (1995). In *Lopez*, this Court noted that just because Congress concluded that a given piece of legislation serves a constitutional purpose, "does not necessarily make it so." *Id.* at 557, n. 2 [quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment)]. In limiting the power of Congress to legislate under the Commerce Clause, the Court took note of the source of the power itself. "[L]imitations on the commerce power are inherent in the very language of the Commerce Clause." *Id.* at 553. The contention by Congress and the Court of Appeals that the creation of extra income can "promote progress" by leading to the creation of more works and the preservation of existing works smacks of the same overextended rationale as was flatly rejected in *Lopez*.

[22] The appellate court felt bound by its "holding in *Schnapper v. Foley*, 667 F.2d 102, 112 (1981), in which [it] rejected the argument 'that the introductory language of the Copyright Clause constitutes a limit on congressional power.' " *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001).

complicated this case. The courts below deemed, wrongly, these *amici* would suggest, that the case dealt with little more than the issue of limited times.[23] Had the issues of prospective and retrospective extension been clearly distinguished below, *amici* believe the lower courts could have seen that, although prospective extensions may pose an apparently impenetrable question, it is one that need not be answered now and perhaps need never be answered.

In light of the fact that prospective extensions are more effectively controlled – if at all – by the "limited times" portion of the Copyright Clause, a decision invalidating copyright extension on that ground could well create an ongoing obligation by this Court to oversee future Congressional extensions. But the Bono Act is the culmination of a habit of copyright term extensions in which retrospective and prospective portions were inextricably and unconstitutionally entangled. By holding that retrospective extension alone is unconstitutional, and that the two sections of the Bono Act are inseverable, this Court can safely leave prospective extension to future Congressional consideration.

IV. THE RETROSPECTIVE AND PROSPECTIVE PORTIONS OF THE BONO ACT ARE NOT SEVERABLE

If this Court accepts the conclusion that the retrospective portions of the Bono Act are indeed unconstitutional, the final question is whether the remaining

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[23] *Eldred*, 239 F.3d at 378-379.

portions of the Act can stand alone. Generally, courts do not review and invalidate any more of a Congressional enactment than necessary.[24] "The standard for determining the severability of an unconstitutional provision is well established: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independent of that which is not, the invalid part may by dropped if what is left is fully operative as a law.' "[25] This Court's most recent articulation of the standard for severing federal statutory provisions retains the necessary condition that to save a portion of an otherwise unconstitutional statute, this Court must find that Congress would have otherwise enacted the remainder of the legislation without the unconstitutional portion. "The unconstitutional provision must be severed unless the statute created in its absence would not have been enacted."[26] This Court's severability standard defers to the judgment of Congress as much as possible, and focuses the inquiry on legislative intent.[27]

Congressional intent may be gleaned from the language and structure of the legislation and from its history.[28] Intent is clear when there is a severability clause; there is no such clause in the Bono Act. "In the absence of

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[24] *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

[25] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987), quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932).

[26] *Alaska Airlines*, 480 U.S. at 685.

[27] *Id.* at 685-86.

[28] *Id.* at 687.

a severability clause . . . Congress' silence is just that – silence – and does not raise a presumption against severability."[29] It is highly unlikely that Congress would have passed any copyright reform at all in 1998 were it not for those who sought relief from the threat of imminently expiring copyrights. Simply, there would have been no prospective extension of copyright protection but for those seeking the unconstitutional provisions. Because the legislative history leaves no doubt that the Bono Act would not have been enacted at all but for its retrospective extension provisions, the prospective provisions may not be severed from the law. The prospective portions of the Bono Act fail to meet the condition of this Court's severability test[30] and accordingly must also be struck.

The prudential advantage of solely invalidating retrospective copyright is that it unburdens Congress, within its constitutionally mandated discretion, to extend or shorten the copyright term in accordance with the democratic process. This Court can be confident that the political process, instead of continuous judicial review, will supply effective oversight. Moreover, it is only the allure of retroactive extension and the undue lobbying influence it invites that has to date perverted the process.

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[29] *Id.* at 686.

[30] A more complete explanation of why the retrospective and prospective portions of the *Bono Act* are not severable can be found in, Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"* 52 FLA. L. REV. 989, 1032-36 (2000).

CONCLUSION

With its generally restrained posture, this Court has suggested that where judicial review is concerned, less is more. While it seems clear that retrospective extension violates the promotion of progress principle underlying the Constitution's Copyright Clause, it is more debatable whether the additional twenty years the Bono Act added prospectively to copyright terms clearly violates the Constitutional limited terms provision. These *amici* believe that this Court can constructively avoid deciding that more vexing issue by finding only the retrospective extension unconstitutional. Because the two provisions are not severable under the *Alaska Airlines* test, this Court can allow Congress to revisit the issue of prospective extension.

This Court can safely leave the more problematic issue of prospective extension to Congress once it no longer serves as the stalking-horse of what can only be called an overly grasping copyright strategy. Well-funded but constitutionally flawed interests have overwhelmed Congress and distorted copyright policy, allowing for the passage of one retroactive extension after another in defiance of the Constitution. Allowing Congress in its discretion to adopt sound copyright policy – as it goes about adjusting the copyright term to optimize progress of expressive works, but not to serve as an ill-gotten windfall to authors of past works – in circumstances free of those constitutionally damaging interests, will ensure

that this Court is not asked to decide again what constitutes an appropriate copyright term.

Respectfully submitted,

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v.

JOHN D. ASHCROFT,
in his official capacity as Attorney General,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICI CURIAE* OF TYLER T. OCHOA, MARK ROSE, EDWARD C. WALTERSCHEID, THE ORGANIZATION OF AMERICAN HISTORIANS, AND H-LAW: HUMANITIES AND SOCIAL SCIENCES ONLINE IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

This brief *amici curiae* is submitted pursuant to Rule 37 of the Rules of this Court.[1]

Tyler T. Ochoa is a Professor and Co-Director of the Center for Intellectual Property Law at Whittier Law School. Mark Rose is a Professor of English at the University of California at Santa Barbara. Edward C. Walterscheid is a historian who has published two books and numerous articles on the history of patent and copyright law. The Organization of American Historians is the nation's largest professional association dedicated to the study of teaching American history. It is comprised of approximately 11,000 individual and institutional members and promotes preservation and access to historical sources and scholarship. H-Net: Humanities and Social Sciences OnLine is a scholarly society with over 100,000 members in more than 90 countries. H-Net currently sponsors 140 free, electronic, interactive discussion forums for scholars, teachers, advanced students and related professionals.

Amici Ochoa, Rose and Walterscheid are scholars who have studied the history and development of copyright and patent law in England and the United States. All *amici* are interested in assuring that Congressional enactments, including the Copyright Term Extension Act of 1998 (CTEA), are consistent with, rather than in conflict with, that history and development. To that end, *amici* present a summary of their understanding of that history and development to aid the Court in its deliberations.

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[1] Counsel for both parties have consented to the filing of this brief, and those consents have been filed with the Clerk of this Court. No counsel for either party authored this brief in whole or in part, and no person other than *amici* and its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The British experience with patents and copyrights prior to 1787 is instructive as to the context within which the Framers drafted the Patent and Copyright Clause. The 1624 Statute of Monopolies, intended to curb royal abuse of monopoly privileges, restricted patents for new inventions to a specified term of years. The Stationers' Company, a Crown-chartered guild of London booksellers, continued to hold a monopoly on publishing, and to enforce censorship laws, until 1695. During this time, individual titles were treated as perpetual properties held by booksellers. In 1710, however, the Statute of Anne broke up these monopolies by imposing strict term limits on copyright, and in the 1730s Parliament twice rejected booksellers' attempts to preserve their monopolies by extending the copyright term. Failing to achieve their ends through legislation, the booksellers sought to circumvent Parliament by arguing that the Statute of Anne was only supplementary to an underlying common-law right that was perpetual; but this effort, too, was rebuffed when the House of Lords determined in 1774 that the only basis for copyright was the Statute of Anne.

In America, too, anti-monopoly sentiment was strong; and when the Constitution was being drafted, the Framers, influenced by the British experience, specified that patents and copyrights could only be granted "for limited Times." The Patent and Copyright Acts of 1790 copied the limited terms of protection provided by the Statute of Monopolies and the Statute of Anne. As in England, advocates of perpetual copyright argued that statutory copyright merely supplemented an existing perpetual common-law right. But following the precedent set by the House of Lords, in 1834 the U.S. Supreme Court rejected the common-law argument and perpetual copyright, confirming the Framers' view that patents and copyrights should be strictly limited in duration in order to serve the public interest.

ARGUMENT

The Constitutional provision granting Congress the power "To promote the Progress of Science and useful Arts" by securing copyrights and patents "for limited Times,"[2] and the implementation of that power by the First Congress in 1790, both reflect the Framers' knowledge of and reliance on the earlier British experience with patents and copyrights.[3] Indeed, the 1790 Copyright Act is directly modeled on the British Statute of Anne,[4] both in its title ("An Act for the Encouragement of Learning") and in many of its provisions, notably its specification of the basic term of copyright as 14 years.[5] An understanding of the prior British experience with patents and copyrights – and specifically with the matter of the limited term – is thus essential to understanding the Framers' approach to copyright.

I. English Antecedents

A. The Statute of Monopolies

Around 1550, British monarchs began to grant monopoly privileges by means of "letters patent," in order

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[2] U.S. Const., Art. I, §8, cl. 8.

[3] *See* Graham v. Deere, 383 U.S. 1, 5 (1966) ("The clause . . . was written against the backdrop of the practices – eventually curtailed by the Statute of Monopolies – of the Crown in granting monopolies to court favorites in goods or business which had long before been enjoyed by the public.").

[4] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned, 8 Anne, ch. 19. (1710) (Eng.).

[5] An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, §1, ch. 15, 1 Stat. 124 (1790).

to encourage foreign tradesmen and manufacturers to introduce their trades into England, and to train apprentices in their craft.[6] During the second half of Elizabeth's reign, however, the Queen began to dispense monopoly patents not for the introduction of new trades, but as rewards for political patronage.[7] Her 1598 grant of a monopoly over the manufacture of playing cards led to the landmark case of *Darcy v. Allen*,[8] in which the judges of the King's Bench held that a patent granting a monopoly over an existing trade, as opposed to a new trade or invention, was invalid. Similar conditions were imposed on the Crown's use of monopoly patents in *The Clothworkers of Ipswich*,[9] in which it was held:

> [I]f a man hath brought in a new invention and a new trade within the kingdom, . . . or if a man hath made a new discovery of any thing, . . . [the King] may grant by charter unto him, that he only shall use such a trade or trafique for a certain time. . . . [B]ut when that patent is expired, the King cannot make a new grant thereof; for when the trade is become common, and others have been bound apprentices in the same trade, there is no reason that such should be forbidden to use it.[10]

Despite these rulings, King James I continued to abuse the royal privilege of granting monopolies.[11] This led to the

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[6] *See* Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 Hast. L.J. 1255, 1259-64 (2001).

[7] *Id.* at 1264-67; Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 Sw. U. L. Rev. 1, 40-54 (2000).

[8] 74 Eng. Rep. 1131 (K.B. 1603).

[9] 78 Eng. Rep. 147 (K.B. 1615).

[10] *Id.* at 148.

[11] Pollack, *supra* note 7, at 65-70.

enactment in 1624 of the Statute of Monopolies,[12] which declared broadly that all monopoly grants were invalid. The Statute had a number of exceptions, however, including one for new inventions "for the Term of fourteen Years or under."[13] The Statute also contained an exception for *existing* monopoly patents for inventors, "for the Term of one and twenty Years only, to be accounted from the Date of the first Letters Patents and Grants thereof made."[14] This was a transitional measure, in effect imposing a term limit on those patents which had been granted for longer terms or which had been unlimited in time.

B. The Statute of Anne

The Statute of Anne was enacted in 1710 in response to petitions from the Stationers' Company, a Crown-chartered guild of booksellers and printers which held a near monopoly on printing and publishing in England until 1695.

Prior to 1710, the Stationers maintained a system whereby guild members could register their "copies," as publishing rights were called, with the guild. Once secured by registration, the right to print a book continued forever, and might be bequeathed or sold to other stationers.[15] These rights were available only to guild members – booksellers and printers, not authors – and thus were not properties that might be freely exchanged in a public market. Under the terms of the Licensing Act of 1662 and

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[12] 21 Jac. I, ch. 3 (1624) (Eng.).

[13] *Id.* §6.

[14] *Id.* §5.

[15] *See* Lyman Ray Patterson, Copyright in Historical Perspective 47-49 (1968).

its predecessors, no book could be printed in England unless it had first been registered with the Stationers.[16]

In 1695, the Licensing Act of 1662 expired, throwing the book trade into disarray. The Stationers at first sought the revival of licensing,[17] but when that attempt failed,[18] they petitioned Parliament for an act that would re-institute their traditional guild system by confirming the Stationers' Company copyrights.[19] As introduced, the proposed legislation did not limit the duration of the Stationers' copyrights.[20]

Parliament was sympathetic to the booksellers' claims about disorders in the trade, but it was not sympathetic to the monopolizing practices whereby the booksellers had turned the literary classics into perpetual private estates. Accordingly, the Statute of Anne acted in two ways to break the booksellers' monopolies. First, the Act established authors as the original proprietors of copyrights. Thus, for the first time, one no longer had to be a member of the Stationers' Company to own copyrights.[21] Second, the proposed legislation was amended to impose term

[16] 14 Car. 2, ch. 33 (1662) (Eng.). This requirement was used by the Crown as an instrument of censorship. *See* PATTERSON, *supra* note 15, at 114-142.

[17] *See* PATTERSON, *supra* note 15, at 138-42. One of the House of Commons' principal objections to renewing the Licensing Act was the monopoly enjoyed by the Stationers' Company. *Id.* at 139-40.

[18] It was during this period that party politics first emerged, and neither party trusted the other with the power of press censorship. *See* FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROLS 260-63 (1952).

[19] *See* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 42-43 (1993).

[20] *Id.* at 43.

[21] PATTERSON, *supra* note 15, at 147; ROSE, *supra* note 19, at 47-48.

limits modeled on those in the Statute of Monopolies.[22] The term of copyright in new works was limited to 14 years, with the possibility of renewal for a second 14-year term if the author were still living at the end of the first.[23] For books that were already in print, including such valuable old literary properties as the works of Shakespeare and Milton, the act provided a single 21-year term.[24] Like the parallel provision in the Statute of Monopolies, this was a transitional provision. The stationers had always treated their guild publishing rights as perpetual; thus, the effect of the 21-year provision was to limit rights that previously had been regarded as unlimited.

The great London booksellers could accept some of the novel provisions of the Act, but not the limited terms of protection, which struck at the heart of the Stationers' Company system. For a time they simply ignored the term limit provision and continued to buy and sell copyrights as if they were still perpetual. Then in 1735, when they believed the political climate favored their cause, the booksellers asked Parliament to change the term of copyright for all books, old and new, to 21 years.[25] The booksellers argued that the proposed change would improve the author's position and foster learning and knowledge; but in fact the consequences for living authors would have been minimal. The most significant effect would have been to extend the statutory copyright on

[22] PATTERSON, *supra* note 15, at 144, 147-150; ROSE, *supra* note 19, at 43-45.

[23] 8 Anne ch. 19 (1710) (Eng.).

[24] *Id.*

[25] ROSE, *supra* note 19, at 52-53. This bill actually reduced the copyright on new books from two fourteen-year terms, or a total of twenty-eight years, to a single twenty-one-year term. In effect, it traded a shorter term on new books for extended protection of valuable old books.

classics such as Shakespeare and Milton until 1756. The booksellers' purposes in requesting the new term did not go unremarked at the time. As one anonymous pamphleteer said:

> I see no Reason for granting a further Term now, which will not hold as well for granting it again and again, as often as the Old ones Expire; so that should this Bill pass, it will in Effect be establishing a perpetual Monopoly, a Thing deservedly odious in the Eye of the Law; it will be a great Cramp to Trade, a Discouragement to Learning, no Benefit to the Authors, but a general Tax on the Publick; and all this only to increase the private Gain of the Booksellers . . .[26]

Not surprisingly, the booksellers' bill failed in the House of Lords, which was particularly hostile to anything that smacked of monopoly.[27] Two years later in 1737, when the booksellers again sought a term extension, a second bill was also defeated by the House of Lords.[28]

C. Donaldson v. Beckett

In the 1730s and 1740s, as titles began entering the public domain, a group of Scottish booksellers began printing their own editions of out-of-copyright titles. Despite the Statute of Anne, the great London booksellers regarded these reprints as piracies. They argued that copyright was fundamentally a matter of common law, not statutory law. Labor, they maintained, gave authors a

[26] A LETTER TO A MEMBER OF PARLIAMENT CONCERNING THE BILL NOW DEPENDING IN THE HOUSE OF COMMONS (1735). A transcript of this pamphlet is attached as Appendix A.

[27] ROSE, *supra* note 19, at 56. The bill died when the second reading was postponed. 24 H.L. Jour. 550 (1735).

[28] ROSE, *supra* note 19, at 56 n.3. Again, the Lords allowed the bill to die at the end of the term. 25 H.L. Jour. 91, 99, 106 & 111-12 (1737).

natural right of property in their works, a right that lasted forever just like a right in a parcel of land or a house; and this right passed undiminished to the booksellers when they purchased literary works from authors.[29] The Statute of Anne merely provided supplemental remedies to an underlying common-law right that was perpetual; therefore all reprints of fairly purchased copyrights were illegal, no matter how old the work in question.

Starting in the 1740s, the booksellers pressed their common-law argument in a series of cases. No decision was reached, however, until 1769, when in *Millar v. Taylor*[30] the court of King's Bench ruled by a three-to-one vote that there was a common-law right and that literary property was perpetual. As an English court, however, the jurisdiction of King's Bench did not extend to Scotland, where the reprint industry continued to thrive. In 1773, in *Hinton v. Donaldson*,[31] the Scottish Court of Sessions reached the opposite decision, determining that in Scotland there was no such thing as a common-law right of literary property. Finally, in the landmark decision of *Donaldson v. Beckett*,[32] the House of Lords, acting as the Supreme Court of Great Britain, decisively rejected the claim of perpetual common-law copyright and established that the only basis for copyright was the Statute of Anne.

The historical record left the basis for the Lords' decision somewhat unclear. In 1774 the House of Lords still decided cases by a general vote of the peers, lawyers

[29] ROSE, *supra* note 19, at 4-8 & 67-91.

[30] 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

[31] *See* JAMES BOSWELL, THE DECISION OF THE COURT OF SESSION UPON THE QUESTION OF LITERARY PROPERTY IN THE CAUSE OF HINTON AGAINST DONALDSON (Edinburgh 1774), *reprinted in* THE LITERARY PROPERTY DEBATE: SIX TRACTS 1764-1774 (Stephen Parks, ed. 1975).

[32] 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).

and laymen alike. In important cases such as *Donaldson*, the twelve common-law judges of the realm (the judges of King's Bench, Common Pleas, and the Exchequer) would be summoned to the House to give their advice on matters of law, after which the peers would debate the issue and vote. The judges were closely divided in their advisory opinions in *Donaldson*, and the most widely cited report of the case indicates that while seven of the eleven judges believed there was a common-law copyright that survived publication, a bare majority of six believed that the common-law right had been divested by the Statute of Anne.[33] Contemporary accounts of the subsequent debate, however, indicate that the claim of common-law copyright was vigorously disputed, and that the peers rejected perpetual copyright by a strong majority.[34]

The great booksellers of London regarded *Donaldson* as a disaster, claiming with some justification that in an instant hundreds of thousands of pounds worth of literary properties had been annihilated.[35] But for the publishing trade as a whole and for the public at large, which was now able to buy cheap reprints of classic works, the

[33] *Id.* In fact, historians now believe that one vote was incorrectly recorded, and that the judges had voted six-to-five that a common-law copyright had survived the Statute of Anne. *See* ROSE, *supra* note 19, at 98-99, 154-58; Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common-Law Copyright*, 29 Wayne L. Rev. 1119, 1164-71 (1983). This error allowed advocates of common-law copyright to claim that the peers had simply followed the vote of the judges, which was not the case. *Id.* at 1169-70; ROSE, *supra* note 19, at 107-10.

[34] *See* ROSE, *supra* note 19, at 97-103. Although it is unclear whether a formal division of the house occurred, *id.* at 102, an often-cited account published in 1813 reports that the vote was 22-11 against perpetual copyright. Donaldson v. Beckett, 17 Parl. Hist. Eng. 953, 992-1003 (H.L. 1774). *See* Abrams, *supra* note 33, at 1159-64.

[35] *See* ROSE, *supra* note 19, at 97.

decision had positive effects. It also had positive effects on authors. Prior to *Donaldson*, the most valuable properties were the old classics that the booksellers could count on as perennials. The *Donaldson* decision meant that now publishers had to pay greater attention to living authors in order to replenish their continually expiring stock of copyrights.[36] In several ways, then, *Donaldson* contributed to the statutory goal of "the encouragement of learning." As a result of the Lords' decision, classic books became more readily accessible, and living authors acquired new incentives to write.

II. The Patent and Copyright Clause of the Constitution

The history of copyright in the United States bears many similarities to the history of copyright in England prior to the Revolution. In America, as in England, proponents of the natural right view of copyright repeatedly sought a perpetual copyright; in America, as in England, the term of copyright was instead strictly limited in order to serve the public interest; and in America, as in England, it took an authoritative decision by the highest court in the land to firmly establish the utilitarian rationale as the dominant rationale for copyright.

A. State Copyright and Patent Laws under the Articles of Confederation

In March 1783, in response to several authors' petitions, the Continental Congress appointed a committee

[36] On the impact of the *Donaldson* decision, *see* Terry Belanger, *Publishers and Writers in Eighteenth-Century England*, in BOOKS AND THEIR READERS IN EIGHTEENTH CENTURY ENGLAND 5-25 (Isabel Rivers ed. 1982).

"to consider the most proper means of cherishing genius and useful arts throughout the United States by securing to the authors or publishers of new books their property in such works."[37] The committee reported that it was "persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce."[38] Under the Articles of Confederation, the Continental Congress had no authority to issue copyrights; so on May 2, 1783, it passed a resolution encouraging the States

> to secure to the authors or publishers of any new books not hitherto printed . . . the copy right of such books for a certain time not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, . . . the copy right of such books for another term of time not less than fourteen years.[39]

Three states had already enacted copyright statutes earlier that year; and within three years all of the remaining states except Delaware had followed suit.[40] As had the Continental Congress' resolution, the preambles of several

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[37] NATIONAL ARCHIVES, PAPERS OF THE CONTINENTAL CONGRESS, No. 36, II, folios 113-114, *reprinted in* BRUCE W. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 112 (1967). The Committee consisted of Hugh Williamson of North Carolina, Ralph Izard of South Carolina, and James Madison of Virginia. *See* 24 JOURNALS OF THE CONTINENTAL CONGRESS 211n (March 24, 1783).

[38] 24 JOURNALS OF THE CONTINENTAL CONGRESS 326 (May 2, 1783). In so stating, this report set forth both natural right and utilitarian justifications for copyright.

[39] Resolution of May 2, 1783, *reprinted in* COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783-1906 11 (2d ed. 1906).

[40] *See* COPYRIGHT ENACTMENTS, *supra* note 39, at 11-31.

of these statutes set forth both natural right and utilitarian justifications for copyright. Significantly, however, all of them were limited to a specified term of years. Seven of the States followed the Statute of Anne and the Continental Congress' resolution in providing two 14-year terms.[41] The five remaining States granted copyrights for single terms of 14,[42] 20,[43] and 21[44] years' duration, with no right of renewal.

South Carolina's copyright statute also included the only general state patent law enacted prior to the Constitution. It provided "that the inventors of useful machines shall have a like exclusive privilege of making or vending their machines for the like term of fourteen years, under the same privileges and restrictions hereby granted to, and imposed on, the authors of books."[45] Throughout this time period, however, the states continued to enact individual patents.[46] The terms of these patents were sometimes as short as five years; but the English fourteen-year term became "almost universal among state patents issued in 1786 and thereafter."[47]

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[41] *See* Act of Jan. 29, 1783 (Conn.); Act of Apr. 21, 1783 (Md.); Act of May 27, 1783 (N.J.); Act of Mar. 15, 1784 (Pa.); Act of Mar. 26, 1784 (S.C.); Act of Feb. 3, 1786 (Ga.); Act of Apr. 29, 1786 (N.Y.), *in* COPYRIGHT ENACTMENTS at 11-13, 15-17, 20-24, 27-31.

[42] Act of Nov. 18, 1785 (N.C.), *in* COPYRIGHT ENACTMENTS at 25-27.

[43] Act of Nov. 7, 1783 (N.H.), *in* COPYRIGHT ENACTMENTS at 18.

[44] *See* Act of Mar. 17, 1783 (Mass.); Act of Dec. 1783 (R.I.); Act of Oct. 1785 (Va.), *in* COPYRIGHT ENACTMENTS at 14-15, 19, 24-25.

[45] Act of Mar. 26, 1784 (S.C.), *in* COPYRIGHT ENACTMENTS, at 23.

[46] *See generally* BUGBEE, *supra* note 37, at 84-103.

[47] *Id.* a 101.

B. The Constitutional Convention and Ratification Debates

At the Constitutional Convention of 1787, both James Madison of Virginia and Charles Pinckney of South Carolina submitted proposals to give Congress the power to grant copyrights. Madison's proposal read: "To secure to literary authors their copy rights for a limited time."[48] Pinckney's proposal read: "To secure to Authors exclusive rights for a certain time."[49] Pinckney also proposed that Congress be given the power "to grant patents for useful inventions."[50] These proposals were referred to the Committee on Detail. Later, provisions which had not been acted upon were referred to the Committee of Eleven (of which Madison was a member),[51] which drafted the Patent and Copyright Clause as it exists today, and recommended its adoption.[52] The clause was unanimously approved by the delegates with no debate.[53]

The language of the Clause is ambiguous when it speaks of "securing" exclusive rights. For the next 47 years, the meaning of this term would be debated, with proponents of perpetual copyright arguing that "securing" meant the affirmation of pre-existing rights, and proponents of the utilitarian view arguing that "securing" meant nothing more than "to obtain" or "to provide." In *Wheaton v. Peters*,[54] this Court held the utilitarian view

[48] JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Ohio Univ. Press 1966) at 477 (Aug. 18, 1787).

[49] *Id.* at 478.

[50] *Id.*

[51] *Id.* at 569 (Aug. 31, 1787).

[52] *Id.* at 580 (Sept. 5, 1787).

[53] *Id.* at 581 (Sept. 5, 1787).

[54] 33 U.S. (8 Pet.) 591 (1834). *See* Section III.D., below.

was correct, noting that the term "securing" applies to both "authors" and "inventors," and that in England, it had always been the case that inventors did not have a natural right in their inventions.[55]

In the ratification debates, the Clause was rarely mentioned. The most significant reference came in the Federalist No. 43, authored by James Madison:

> The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at Common Law. The right to useful inventions seems with equal reason to belong to the inventors. The public good coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.[56]

In light of the decision in *Donaldson v. Beckett*,[57] Madison's statement that copyright had been adjudged to be a common-law right is problematic. It has been suggested that Madison was relying on the first American edition of Blackstone's *Commentaries*, which reported the decision in *Millar v. Taylor*, but not its subsequent overruling in

[55] *Id.* at 661. *See also* CHRISTINE P. MACLEOD, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM 1660-1800 198 (1988) (in *Donaldson*, "the *lack* of a natural right in mechanical inventions provided a fixed pole of the debate.") (emphasis in original). In a letter to Isaac MacPherson, Thomas Jefferson set forth a famous critique of the natural rights view with regard to inventions. *See* Letter of Aug. 13, 1813, *in* THE COMPLETE JEFFERSON 1011, 1015-16 (Saul K. Padover ed. 1943).

[56] James Madison, The Federalist No. 43 at 279 (Modern Library ed. 1941).

[57] *See* Section I.C., above.

Donaldson.[58] It has also been suggested that Madison was relying on Burrow's report of the *Donaldson* case, in which it was reported that the advisory judges were of the opinion that copyright was a common-law right, but one that had been divested by the Statute of Anne.[59] It is also possible that Madison was referring only to the common-law right of first publication; or that he was simply trying to win the support of those who believed that copyright was a natural right.[60] In any case, Madison later took the position that the English common law was deliberately not made applicable in the United States by the new Constitution.[61] This seems to preclude any argument that Madison believed the Clause was "securing" a pre-existing right.[62]

What is clear from the Federalist is that Madison believed that the state copyright laws were ineffectual. This point was also made during the ratification debates by Thomas McKean of Pennsylvania,[63] and future Justice

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[58] *See* 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 405-07 (Philadelphia 1771). Blackstone qualified his report of *Millar v. Taylor*, however, stating that "[n]either with us in England hath there been any final determination upon the right of authors at the common law." *Id.* at 406-07. It should be noted that Blackstone was a prominent advocate of common-law copyright, and that he argued the booksellers' cause in both *Tonson v. Collins* (1760) and *Millar v. Taylor*.

[59] *See* Section I.C., above. The fourth volume of Burrow's reports was published in 1776, and citations to it are found in early Pennsylvania cases. *See, e.g.*, Respublica v. Doan, 1 U.S. (1 Dall.) 86, 90-91 (Pa. 1784); Nathan v. Virginia, 1 U.S. (1 Dall.) 77, 78 (Pa. C.P. 1781).

[60] *See* Abrams, *supra* note 33, at 1177-78.

[61] *See* Letter from James Madison to George Washington (Oct. 18, 1787), *in* 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 129-30 (1911).

[62] For a more extensive analysis, *see* EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 201-238 (2002).

[63] *See* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 415 (Merrill Jensen, ed. 1976).

James Iredell of North Carolina.[64] Iredell also set forth the utilitarian justification for copyright, saying, "such encouragement may give birth to many excellent writings which would otherwise have never appeared."[65]

The stipulation that patent and copyright protection be granted only "for limited Times," only to "authors" and "inventors," and only "To promote the Progress of Science and useful Arts," appears to have been aimed at preventing the kinds of abuses that had prompted the Statute of Monopolies 150 years earlier. It is clear that many of the Framers were concerned with restraining monopolies of all kinds. This concern was most clearly expressed in correspondence between Thomas Jefferson and James Madison concerning the proposed Constitution.

After receiving a draft of the Constitution, Jefferson wrote to Madison, saying: "I will now add what I do not like. First, the omission of a bill of rights providing clearly and without the aid of sophisms for . . . restriction against monopolies."[66] Jefferson amplified his views in a letter to Madison dated July 31, 1788:

> [I]t is better to . . . abolish . . . Monopolies, in all cases, than not to do it in any. . . . The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.[67]

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[64] *See* 16 DOCUMENTARY HISTORY, *supra* note 63, at 386 note (c).

[65] *Id.* at 382.

[66] Letter from Jefferson to Madison (Dec. 20, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON 440 (Princeton 1955).

[67] Letter from Jefferson to Madison (July 31, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON 442-43 (Princeton 1956).

Madison replied in a letter dated October 17, 1788:

> With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it?[68]

Madison's explanation is revealing in several respects. First, it endorses the utilitarian justification for copyrights and patents. Second, in using the words "privilege" and "grant," it indicates that patents and copyrights are bestowed by the government, rather than merely confirming existing rights. Third, in recommending that the public reserve the right to buy out the author or inventor during the term of the grant, Madison suggests that even the 14-year terms with which he was familiar might work a hardship upon the public in certain circumstances.

Jefferson was apparently persuaded by Madison's argument; but he remained concerned that the power to grant exclusive rights could be abused. Upon receiving Madison's draft of the Bill of Rights, Jefferson wrote:

> I like it as far as it goes; but I should have been for going further. For instance, the following alterations and additions would have pleased me. . . . Art. 9. Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding __ years but for no longer term and for no other purpose.[69]

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[68] Letter from Madison to Jefferson (Oct. 17, 1788), *in* 14 THE PAPERS OF THOMAS JEFFERSON 21 (Princeton 1958).

[69] Letter from Jefferson to Madison (Aug. 28, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 367-68 (Princeton 1958).

Jefferson's concerns were widely shared by others at the time. George Mason, a delegate to the Constitutional Convention from Virginia, refused to sign the proposed Constitution, in part because "[u]nder their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce."[70] Elbridge Gerry of Massachusetts refused to sign for similar reasons.[71] In New York, "A Son of Liberty" wrote that "Monopolies in trade [will be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of those companies who will have an exclusive right."[72] In addition, the ratifying conventions of four states requested an amendment expressly restricting Congress' power to grant "exclusive advantages of commerce."[73]

Proponents of the Constitution responded to these concerns not by denying that monopolies were generally harmful, but by emphasizing the utilitarian justification for copyrights and patents, and the limitations placed on

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[70] 8 DOCUMENTARY HISTORY, *supra* note 63, at 45.

[71] 4 DOCUMENTARY HISTORY, *supra* note 63, at 14.

[72] 13 DOCUMENTARY HISTORY, *supra* note 63, at 482. *See also* 4 DOCUMENTARY HISTORY, *supra* note 63, at 428 ("The unlimited right to regulate trade, includes the right of granting exclusive charters. . . . We hardly find a country in Europe which has not felt the ill effects of such a power. . . . [In England,] Individuals have been enriched, but the country at large has been hurt.") ("Agrippa").

[73] 2 THE DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870 (State Dept. 1894) at 95 (Massachusetts), 142 (New Hampshire), 198 (New York) 274 (North Carolina).

them by the Clause.[74] Expressions of anti-monopoly sentiment were sometimes qualified in this regard.[75]

Many years later, in a manuscript published after his death, Madison summed up his views as follows:

> Monopolies though in certain cases useful ought to be granted with caution, and guarded with strictness against abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use. There can be no just objection to a temporary monopoly in these cases; but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given. . . .[76]

Thus, the Clause appears to have been designed not so much to limit the means by which Congress could promote the progress of science and useful arts, but rather to limit

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[74] *See* Remarks on the Amendments to the Federal Constitution by the Rev. Nicholas Cottin, *in* 6 THE AMERICAN MUSEUM 303 (1789), *reprinted in* Walterscheid, *supra* note 62, at 10.

[75] James Kent of New York wrote to Nathaniel Lawrence, a delegate to the New York ratifying convention: "I have just been reading Smith *on the Wealth of Nations* & he has taught me to look with an unfavorable eye on monopolies – But a monopoly of the mental kind I take to be laudable and an exception to the rule." 14 DOCUMENTARY HISTORY, *supra* note 63, at 76. And in Pennsylvania, "Centinel" wrote "that monopolies in trade or arts, other than to authors of books or inventors of useful arts, ought not to be suffered." 13 DOCUMENTARY HISTORY, *supra* note 63, at 466.

[76] JAMES MADISON, WRITINGS 756 (Jack N. Rakove ed. 1999). This essay was published posthumously in 1914. *See* James Madison, *Aspects of Monopoly One Hundred Years Ago*, 128 HARPER'S MAG. 489, 490 (1914).

the duration and purposes for which exclusive rights could be granted.

III. Statutory and Judicial Interpretation

A. The Copyright and Patent Acts of 1790

The Copyright Act of 1790 granted copyrights for a term of 14 years, with a right of renewal for another 14-year term if the author survived to the end of the first term.[77] The Act covered "any map, chart, book or books already printed within these United States," as well as "any map, chart, book or books already made and composed, but not printed or published, or that shall hereafter be made and composed."[78] Except for the addition of maps and charts, this language was copied almost verbatim from the Statute of Anne.

Granting federal copyrights to previously published works was consistent with the Statute of Anne and with the utilitarian justification for copyright. Just as the Statute of Anne had provided a term of 21 years for previously published works, in order to limit previously unlimited guild rights and to ease the transition from a state-licensed monopoly to a free market,[79] the Copyright Act of 1790 likewise may have provided protection to previously published works in order to limit the term of any claims based on state or common law, and to ease the transition from uncertain and largely ineffective state copyright protection to a single federal copyright. The initial 14-year term was shorter than the term provided by four of the states;[80] but the availability of a renewal term ensured that no author would be deprived of the term that

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[77] An Act for the encouragement of learning, §1, ch. 15, 1 Stat. 124 (1790).

[78] *Id.*

[79] *See* Section I.B., above.

[80] *See* Section II.A., above.

he or she had been promised under previous state legislation.

The Patent Act of 1790 permitted patents to be granted "for any term not exceeding fourteen years."[81] No provision was made for the extension or renewal of a patent.[82] Unlike the Copyright Act of 1790, the Patent Act of 1790 did not expressly address the issue of retroactivity; but the Patent Act of 1793 expressly required that an inventor relinquish any state patent rights as a condition of obtaining a federal patent.[83]

B. Private Patent and Copyright Laws

In 1808, Congress extended by private act the term of a patent owned by inventor Oliver Evans.[84] Evans' patent had been held invalid because the face of the document did not recite the allegations made in the patent application.[85] The form of the document, however, was drafted by the Secretary of State, not by Evans. James Madison, then Secretary of State, reported that "a compliance with [the

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[81] An Act to promote the progress of useful Arts, §1, ch. 7, 1 Stat. 110 (1790).

[82] Because of this omission, many inventors petitioned Congress for extension or renewal of their individual patents. *See* Section III.B., below. In 1832, Congress enacted a statute specifying the conditions under which it would consider such petitions. Act of July 3, 1832, §2, ch. 162, 4 Stat. 559. In 1836 this was replaced with an administrative procedure by which a single extension of seven years could be granted. Patent Act of 1836, §18, ch. 357, 5 Stat. 124-25. This provision was repealed in 1861, when the basic patent term was increased from 14 years to 17 years. Act of March 2, 1861, ch. 88, §16, 12 Stat. 249. *See* Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyr. Soc'y USA 19, 52-54 (2002).

[83] Patent Act of 1793, §7, ch. 11, 1 Stat. 322.

[84] An Act for the relief of Oliver Evans, ch. 13, 6 Stat. 70 (1808).

[85] Evans v. Chambers, 8 F. Cas. 837 (C.C.D. Pa. 1807) (No. 4,555).

decision] would admit the invalidity of all the patents issued in the same form since the commencement of the Government."[86] As a result, Congress agreed to extend the term of Evans' patent to compensate him for the administrative error. While this action indicates that the Congress of 1808 believed it could extend the term of a patent for equitable reasons,[87] it is also consistent with the utilitarian rationale. Evans had relied on the benefit of a 14-year patent term, and he was deprived of a portion of that term not through any fault of his own, but as a result of an administrative error. Granting an extension restored to Evans the benefit of his patent bargain.[88] Similar equitable adjustments of individual patent terms have been granted in recent years for reasons beyond the inventor's control, such as war, judicial corruption, and delay in FDA approval.[89]

In 1828, Congress extended by private act the copyright in a book of tables of discount and interest compiled by James Rowlett.[90] Rowlett had invested a great deal of time and money in ensuring the accuracy of his tables, and he sought an extension to recover some of the

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[86] *See* AMERICAN STATE PAPERS, No. 231, 1 Misc. 646 (1807).

[87] Congress also extended the terms of nine more patents between 1809 and 1836. *See* Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 543 (1852) (listing extensions). It should be noted, however, that by 1808 only one delegate to the 1787 Constitutional Convention, Nicholas Gilman of New Hampshire, remained in Congress; and that of the nine additional extensions, only one was enacted prior to Gilman's leaving Congress in 1814.

[88] In fact, however, Congress was more generous than necessary, granting Evans a full 14-year extension. For a more extensive analysis, *see* Ochoa, *supra* note 82, at 58-72, 97-109.

[89] *See* Ochoa, *supra* note 82, at 72-82.

[90] An Act to continue a copy-right to John Rowlett, ch. 145, 6 Stat. 389 (1828).

money he had lost on the first edition.[91] At that time, the investment of time and money was at least arguably an acceptable basis for copyright protection; but now that this Court has firmly rejected the "sweat of the brow" doctrine as inconsistent with the Patent and Copyright Clause, the basis of Rowlett's claim to an extension has been eroded.[92] Since then, Congress has extended a copyright by private act only once, and that extension was held invalid.[93]

C. The Copyright Act of 1831

In 1826, Noah Webster wrote to Daniel Webster, seeking his assistance in securing a perpetual copyright, saying "an author has, by common law, or natural justice, the sole and *permanent* right to make profit by his own labor."[94] Daniel Webster replied that he would forward the letter to the House Judiciary Committee, but he added "I confess frankly that I see, or think I see, objections to make it perpetual. At the same time I am willing to extend it further than at present."[95]

Noah Webster's son-in-law, William W. Ellsworth, was elected to Congress in 1828 and was appointed to the Judiciary Committee. Webster "applied to him to make efforts to procure the enactment of a new copy-right law."[96]

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[91] *See* Ochoa, *supra* note 82, at 46-48.

[92] Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991); *see* Ochoa, *supra* note 82, at 50-51.

[93] Priv. L. No. 92-60, 85 Stat. 857 (1971); United Christian Scientists v. Christian Science Board of Directors, 829 F.2d 1152 (D.C. Cir. 1987).

[94] Noah Webster, *Origin of the Copy-Right Laws in the United States*, in A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 176 (1843) (emphasis in original).

[95] *Id.* at 176-77.

[96] *Id.* at 177.

The Report prepared by Ellsworth for the Judiciary Committee shows the influence of Webster's views. It states: "[u]pon the first principles of proprietorship in property, an author has an exclusive and perpetual right, in preference to any other, to the fruits of his labor."[97] It also asserts (erroneously) that:

> In England, the right of an author to the exclusive and perpetual profits of his book was enjoyed, and never questioned, until it was decided in Parliament, by a small vote . . . that the statute of Ann had abridged the common law right, which, it was conceded, had existed, instead of merely guarding and securing it by forfeitures for a limited time, as was obviously intended."[98]

Despite this endorsement of perpetual copyright as a natural right, the bill provided only for an initial term of 28 years and a renewal term of 14 years,[99] the term of which was extended to all subsisting copyrights.[100]

When the bill was debated in Congress, Rep. Michael Hoffman of New York complained that it would "establish a monopoly of which authors alone would reap the advantage, to the public detriment."[101] He noted that patents were limited to 14 years, and argued:

> So it should be . . . with the author or publisher. There was an implied contract between them and the public. They, in virtue of their copyright, sold their books to the latter at an exorbitant rate;

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[97] 7 GALES & SETON'S REGISTER OF DEBATES IN CONGRESS cxx (Dec. 17, 1830).

[98] *Id.* at cxix.

[99] Copyright Act of 1831, §§1-2, ch. 16, 4 Stat. 436.

[100] *Id.* §16, 4 Stat. 439.

[101] 7 GALES & SETON'S REGISTER OF DEBATES at 423 (Jan. 6, 1831).

> and the latter . . . had the right to avail themselves of the work, when the copyright expired.[102]

Ellsworth replied, arguing that the bill would "enhance the literary character of the country, by holding forth to men of learning and genius additional inducements to devote their time and talents to literature and the fine arts."[103] Ellsworth did not explain how this justified the retroactive extension; but Rep. Gulian C. Verplanck of New York maintained that "[t]here was no contract; the work of an author was the result of his own labor. It was a right of property existing before the law of copyrights had been made. That statute did not give the right, it only secured it."[104]

This record reveals that the 1831 term extension was based on the view that copyright was a natural right of the author.[105] Three years later, this view was rejected by the U.S. Supreme Court in *Wheaton v. Peters*.

D. Wheaton v. Peters

In 1827, Richard Peters succeeded Henry Wheaton as the reporter of decisions for the U.S. Supreme Court.[106] In 1829, Peters began to publish "Condensed Reports" of the cases that had been decided prior to his appointment.[107]

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[102] *Id.*

[103] *Id.*

[104] *Id.* at 424. Verplanck also stated erroneously that in "the great case of literary property . . . the judges were unanimously of opinion that an author had an inherent right of property in his works." *Id.*

[105] It should be noted that by 1831, not a single member of the Constitutional Convention or the First Congress remained in Congress.

[106] *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291, 1351-58 (1985).

[107] *Id.* at 1362-70.

Wheaton and his publisher sued, alleging that Peters had copied Wheaton's Reports. Peters answered that Wheaton had not complied with the requirements for obtaining a statutory copyright, and that no right to common-law copyright existed. Circuit Judge Joseph Hopkinson agreed, dismissing the complaint and dissolving the preliminary injunction on January 9, 1833.[108]

On appeal, Elijah Paine, arguing for Wheaton, contended that "An author was entitled, at common law, to a perpetual property in the copy of his works, and in the profits of their publication."[109] Representing Peters, Joseph Reed Ingersoll argued that Wheaton's view was inconsistent with the Patent and Copyright Clause, saying "[t]here would be no occasion to secure for a limited time, if the exclusive right already existed in perpetuity."[110]

Justice McLean delivered the majority opinion, which dealt a decisive blow to the notion of copyright as a perpetual common-law right:

> [T]he law appears to be well settled in England, that, since the statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute. And that, notwithstanding the opinion of a majority of the judges in the great case of Millar v. Taylor was in favour of the common law right before the statute, it is

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[108] Wheaton v. Peters, 29 F. Cas. 862 (C.C.E.D. Pa. 1832) (No. 17,486), *rev'd*, 33 U.S. (8 Pet.) 591 (1834). Although the judgment was reversed and remanded for a determination whether Wheaton had complied with the requirements for a statutory copyright, the Supreme Court opinion made it clear that Wheaton could not claim a common-law copyright.

[109] 33 U.S. at 595-96, *citing* Millar v. Taylor, 4 Burr. 2303 (K.B. 1769).

[110] 33 U.S. at 629.

still considered, in England, as a question by no means free from doubt.

> That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world. . . .[111]

In so holding, the Court expressly relied on the lack of a natural right in inventions.[112] It said:

> [T]he word secure, as used in the constitution, could not mean the protection of an acknowledged legal right. It refers to inventors, as well as authors, and it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.[113]

The Court concluded that "Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. . . . [I]f the right of the complainants can be sustained, it must be sustained under the acts of congress."[114]

In rejecting Wheaton's claim of perpetual common-law copyright, the U.S. Supreme Court confirmed the utilitarian view embodied in the Constitution that patents and

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[111] *Id.* at 657.

[112] *Id.* at 657-58.

[113] *Id.* at 661. *See also* note 55, above.

[114] *Id.* at 661-62. The court added that "[i]t may be proper to remark that the court are unanimously of the opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." *Id.* at 668.

copyrights are exclusive rights of limited duration, granted in order to serve the public interest in promoting the creation and dissemination of new works. By placing these limits in the Constitution, the Framers hoped to avoid the kinds of abuse of monopoly power that had existed in England. In the words of Madison, "[t]here can be no just objection to a temporary monopoly in these cases; but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given."[115]

CONCLUSION

When the U.S. Constitution granted Congress the power to secure copyrights "for limited Times," it did so in the context of the British struggles to restrain the booksellers' monopoly claims. The circumstances of the present case seem strikingly parallel to those of 18th-Century Britain. Once again the underlying struggle is between the great holders of old copyrights (movie studios, music publishers, and others) and those who would reprint or otherwise reproduce classic works and circulate them more widely. The Framers were wary about allowing perpetual monopolies, and there is every reason to believe that they would have been as skeptical as the British pamphleteer of 1735 who remarked that allowing an endless series of term extensions would establish a de facto perpetual monopoly, "a Thing deservedly odious in the Eye of the Law." His warning seems as relevant today as they did then: If the CTEA is upheld, what is to prevent the great copyright holders from obtaining further extensions again and again, as often as the old ones expire? In the words of the pamphleteer, it will be "a great

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[115] JAMES MADISON, WRITINGS 756 (Jack N. Rakove ed. 1999).

Cramp to Trade, a Discouragement to Learning, no Benefit to the Authors, but a general Tax on the Publick; and all this only to increase the private Gain of the Booksellers."

Respectfully submitted,

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APPENDIX A

A Letter to a Member of Parliament concerning the Bill now depending in the House of Commons, for making more effectual an Act in the 8th Year of the Reign of Queen Anne, entitled, An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned (London, 1735)[1]

Sir,

The Bill now depending in your House for making more effectual, An Act for the Encouragement of Learning, etc. having the specious Shew of being calculated for the Furtherance of Learning, and the Securing of Property; two things for which you have always shewn a becoming Zeal; I wonder not, that you should at first be inclin'd to favour it, especially considering the many deceitful Arts, and false Insinuations which some have made use of, in order to make the World entertain that Opinion of it: But when, upon a serious Review, those Arts shall be exposed, and the Falsehoods detected, it will plainly appear to be so far from having any real Tendency to the promoting of Learning, that, on the contrary, it will greatly cramp it, and manifestly hinder its spreading in the World; so far from the securing of Property, that it will notoriously invade the natural Rights of Mankind, and subject the Publick to an exorbitant Tax, in order to increase the Profits of those, who have neither Colour of Title, nor Pretence of Merit; and when this shall appear to be the Case, I doubt not but the same laudable Motives which at

[1] This is a transcript of a broadside publication, from the copy in the Bodleian Library, Oxford (Ms. Carte 207 f. 31).

first prompted you to encourage it, will prevail with you to oppose a Design so unjust in itself, and so detrimental to the Interest it is pretended to promote.

And whereas many have been artfully made to believe, that the aforesaid Act passed in the 8th Year of Queen Anne is now expired, and therefore have the more readily concurred in promoting a Bill which they look on only as the Continuance or Revival of an expiring Law, it will be proper to give you a true State of the Case in that Particular.

Before the Act of the 8th of Queen Anne, there was no Law which vested in any one the sole Copy-Right of any Books which were published to the World; but when once a Treatise was made publick, every one was at Liberty to make free with it. This, to be sure, was a great Discouragement to Authors, who were by this means in great measure deprived of the Profit of their Works; and this was the Grievance which gave Occasion to the making of that Act, in order to remedy which, by giving due Encouragement to Authors, and yet to prevent the contrary Extreme, by giving a Monopoly for too long a Time, that Act provides as follows.

1. As to such Books which were printed and published before the Date of the Act, viz. April 10. 1710, the Authors, or those who had purchased of the Authors, should have the sole Right and Liberty of Printing them for the Term of Twenty One Years from the Date of the Act.

2. As to such Books which should be afterwards printed and published, the Authors, or those who should purchase them of the Authors, should have the sole Right and Liberty of Printing them for the Term of Fourteen Years from the Time of their being first published; and if

the Authors be living at the End of that Term, they should have another Term for Fourteen Years, in all Twenty eight Years; and all others are prohibited under certain Penalties from Re-printing or Importing the same.

As this was not a temporary Law, and stands unrepealed, it is as much in Force now as ever, only the Term of Twenty One Years, which was granted for Books printed and published before the Date of the Act is expired. But the Booksellers, it seems, do not think this Term sufficient, and are therefore desirous to have it renewed for another Twenty One Years. But what Reasons have they offer'd why such a Request should be granted? In all other Inventions, which yet are as much the natural Property of the Inventors, as Books are of the Authors, the Law deems Monopolies so destructive of the publick Good, that the Crown is restrained by 21 Jac. cap. 3. from granting a Patent for any Term exceeding Fourteen years. In this Instance therefore the Legislature has already been more than ordinary liberal; and tho' they very justly thought, that some certain Term should be secured to the Authors, yet, at the same time, they judg'd it reasonable that some Limitation should be set to that Term, that one time or other the Publick might have the common Benefit of a Work, after they had for several Years contributed to the Author's Profit. This Limitation they have fix'd to Twenty One Years; and therefore the Act provides that the sole Liberty of Printing etc. shall continue no longer. And why is not this Encouragement sufficient? Or, what has since happen'd, which should occasion the Legislature to alter their Judgment in this Point? Is there any room to think, that any useful or valuable Work has been suppress, for want of a longer Term to the Authors? No, the Authors, for what appears, are very well satisfied with the Encouragement the Law allows

them; for it is not they, but the Booksellers who make this Application; and what Pretence can the Booksellers have to a larger Term? Will Learning be encourag'd by giving them a longer Interest in Books already published, even to the Exclusion of the Authors themselves? But it is said they have purchased the Copies of the Authors; but what have they purchased? Only an Interest for Twenty One Years. The Author by Law had no more, and therefore could grant no greater Interest to the Booksellers than what they themselves had. So that, if it were reasonable to enlarge the Term, surely it ought to be enlarged to the Authors, and not the Booksellers, who cannot be supposed to have paid a Consideration greater than what was adequate to the Interest assigned to them. To what Purpose then is any Argument fetch'd from Family Settlements? Can private Settlements overturn the Law? Or, can any one gain a greater Interest in an Estate, by taking upon him to make a Disposition of that which he has no Right to dispose of?

But it is pretended, that if the Authors could assign a larger Interest, the Booksellers could afford them a better Price for their Copy. This then is a Concession, that they have hitherto allowed the Authors only in Proportion to the Interest which the Laws now in Being would permit them to convey; how unreasonable then is it, that the additional Term sought for should be vested in the Booksellers, who have paid no Consideration for the same, consequently have no natural nor equitable Right thereto. And as to any Books hereafter to be published, what additional Advantage can it be expected an Author can have by a longer Term, over and above what he may now have for his Fourteen Years, and a Covenant for Fourteen Years longer, if he lives? The Booksellers will always take care, to extort from the Author the whole Interest he is

able to convey; I would gladly know therefore, what these generous Booksellers would be willing to advance to an Author for a Reversion after Twenty eight Years, and by that some Judgment may be made what additional Benefit a longer Term will be to the Author. I believe most People will be ready to answer, little or nothing. Where then is the Advantage that will accrue thereby to the Author? On the contrary, if the Author should outlive the exclusive Property of the Bookseller, he may hope, by re-printing his own Work, to gain some new Profit, since an Edition published by the Author will always have the Preference to any other. Thus it is in respect to the Author; but, as to the Publick, should the Bill pass, it would be much worse; for many Tradesmen who can now employ themselves in their respective Callings, must then stand still for want of Work. Books will now be sold at much easier Rates, and consequently, by passing into more Hands, will render the Knowledge contained in them more diffusive; but should this Bill pass into a Law, by being the sole Property of one or a few, they will be sold at higher Prices, and consequently be confined to a small Number, in comparison of what they would otherwise be. Many Books that are now scarce will probably be re-printed, while they are left free and open to the Publick, which while they are private Property, may long continue out of Print; the particular Proprietors either thro' Indolence, or for some other Reason, being indisposed to venture a new Impression of them.

As to any Argument drawn from the Employment of Printers, Bookbinders, Women and Children, it is certain, while the Liberty of Printing and Selling Books is left at large, they will be sold cheaper, and in larger Numbers, and therefore will increase the Business of these Trades,

and of the Women and Children employed therein, much more than if they are restrained to be the Property of a few, as Experience abundantly shews.

As to the Pretence of furnishing foreign Markets, there can be no doubt but that End will be best attained by such Methods as may enable us to afford our Books at so low a Price, that Foreigners may not be able to undersell us; which can be done no way so well, as by leaving it open to the whole Trade: For, as to the Method of settling the Price of Books by the Archbishop of Canterbury, etc. The Booksellers very well know, that the Nature of their Trade is such, as renders the same impracticable; for which Reason, it has scarce ever been exercised, altho' the Booksellers have not been wanting in furnishing just Cause of Complaint.

Here I cannot but observe one Artifice made use of by the Booksellers in Reprinting Mr. Addison's Tatler, No. 101. upon this Subject, at this Juncture, as if that Ingenious Author had thought the Term of Twenty-One Years not sufficient. But it is to be noted, that whatever is there said by him is said on behalf of Authors and not Booksellers, and was said before the Act of Q. Anne; so that whatever Ground of Complaint there might then be, the same was wholly taken away by that Statute, and Mr. Addison must be understood to complain only of the Law as it then stood, and not as it has been since alter'd by that Statute to which his Arguments are no Way applicable. Upon the whole, I see no Reason for granting a further Term now, which will not hold as well for granting it again and again, as often as the Old ones Expire; so that should this Bill pass, it will in Effect be establishing a perpetual Monopoly, a Thing deservedly odious in the Eye of the Law; it will be a great Cramp to Trade, a Discouragement

to Learning, no Benefit to the Authors, but a general Tax on the Publick; and all this only to increase the private Gain of the Booksellers, who as they can have no natural Title to the Copy, so they can have no legal or equitable Title thereto, beyond the Interest assigned them by the Author, which could be for no more than the Term allowed by Law. For these Reasons I doubt not your Zeal for the Publick Good, which you have used to exert on other Occasions, will be exerted on this, to prevent a Law, which is likely to be productive of such mischievous Consequences to the Publick.

Supreme Court, U.S.
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No. 01-618

IN THE
Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT, In his official capacity as Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief *Amicus Curiae* of the Free Software Foundation in Support of Petitioners

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QUESTION PRESENTED

1. Did the Court of Appeals err in holding that, under the Copyright Clause, Congress may indefinitely extend the term of existing copyrights by *seriatim* adoption of nominally "limited" extensions?

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief *Amicus Curiae* of the Free Software Foundation in Support of Petitioners

INTEREST OF *Amicus Curiae*

This brief is filed on behalf of the Free Software Foundation, a charitable corporation with its main offices in Boston, Massachusetts.[1] The Foundation believes that

[1]Counsel for both parties have consented to the filing of this brief, and those consents have been filed with the Clerk of this

people should be free to study, share and improve all the software they use, as they are free to share and improve all the recipes the cook with, and that this right is an essential aspect of the system of free expression in a technological society. The Foundation has been working to achieve this goal since 1985 by directly developing and distributing, and by helping others to develop and distribute, software that is licensed on terms that permit all users to copy, modify and redistribute the works, so long as they give others the same freedoms to use, modify and redistribute in turn. The Foundation is the largest single contributor to the GNU operating system (used widely today in its GNU/Linux variant for computers from PCs to supercomputer clusters). The Foundation's GNU General Public License is the most widely used "free software" license, covering major components of the GNU operating system and tens of thousands of other computer programs used on tens of millions of computers around the world. The Foundation is strongly interested in the use and development of copyright law to encourage sharing, and to protect the rights of users and the public domain.

Court. No counsel for either party had any role in authoring this brief, and no person other than the *amicus* and its counsel made any monetary contribution to its preparation and submission.

SUMMARY OF ARGUMENT

"Actually, Sonny [Bono] wanted the term of copyright protection to last forever."
—Rep. Mary Bono
144 Cong. Rec. H9951 (daily ed. Oct. 7, 1998)

If the late Representative Bono believed that was possible, he was mistaken. The Court of Appeals erred in holding that Congressmen sharing his object can achieve what the Constitution expressly forbids, simply because they do so in a series of enactments rather than a single statute.

No one seriously contends that Congress may achieve an expressly unauthorized end by dividing the means of its achievement into multiple statutes. Yet the Court of Appeals held that, so long as each individual statute states a precise numerical increment, Congress can extend the life of existing copyrights indefinitely. This conclusion is in direct conflict with the language of the Copyright Clause, Article I, §8, cl. 8, in its natural sense. The constitutional history of England and British North America, moreover, is unambiguous about the importance of "limited Times" in the control of all state-awarded monopolies, of which genus copyright and patent are species. The very evils that led English and British North American constitutional lawyers to insist on the strictly limited term of royal and statutory monopolies, and to embody that requirement in the Copyright Clause of Article I, are present in the retroactive extension of existing copyrights by the Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, Title I, 112 Stat. 2827, at issue in this case.

In the sphere of copyright, the limited time requirement protects the public domain, by providing for its

constant enrichment. The public domain is an essential resource of our constitutional system of free expression. As this Court has previously recognized, several aspects of the copyright system represent constitutionally-required limitations on the nature of the monopoly Congress is empowered to grant. The limited term is not only a particularly important constitutional limitation on Congressional power by virtue of its presence in the text itself—which goes beyond the textually-implicit limitations of fair use and the idea-expression dichotomy—but also in the function it serves: the protection of the common resource of the public domain.

The CTEA unconstitutionally imperils the commons of the public domain by flouting the clear intention of the limited term requirement. If Congress had acted unilaterally to reduce copyright terms, as the Solicitor General seems to believe it may, forcing some material into the public domain decades ahead of current schedule, no doubt the copyright industries would attack the legislation as a taking. If, on the other hand, Congress acted to extend every 50-year lease by the federal government for an additional 99 years at the government's current rent, there is no question that compensation would be required. Congress should not be permitted to take the public's reversionary interest in the public domain, any more than it can take a portion of the copyright holder's original term or of any leasehold interest in real property. The constitutional system of free expression, the language of the Copyright Clause, and the history of our tradition demand no less.

ARGUMENT

I. The Framers Intended Copyright to Be a Statutory Monopoly Awarded to Works of Authorship For A Strictly Limited Time

The words "for limited Times" appear in the Copyright Clause, Article I, §8, cl. 8 as the result of long and bitter experience with the constitutional evil of state-awarded monopolies. From the seventeenth century, the requirement of limitation in time was a basic constitutional mechanism for dealing with the potential for abuse of power inherent in the royal or statutory monopoly. The use by Queen Elizabeth of letters patent monopolizing certain trades as a means of raising money from bidders for monopoly profits gave rise to the case of *Darcy* v. *Allen*, (*The Case of Monopolies*), 11 Co. Rep. 84 (1603), in which a royal patent monopoly on the making and distribution of playing cards was held void. Parliament followed in 1624 with the Statute of Monopolies, 21 Jac. I, c. 3, which declared that only Parliament might grant statutory monopolies, limited to new inventions, for a period not to exceed fourteen years. *See* 4 William Blackstone, *Commentaries on the Laws of England* *159 (1769). This constitutional limitation was evaded by Charles I during his period of despotic personal rule; the resulting royal monopolies formed a significant grievance in the years leading up to the English Civil War. *See* Cecily Violet Wedgwood, *The King's Peace* 156-62 (1955).

American colonists at odds with the government of Charles I perceived the evil of governmental monopolies; in the Massachusetts Bay Colony as early as 1641, the Colony's General Court decreed that "there shall be

no monopolies granted or allowed amongst us, but of such new inventions that are profitable to the country, and that for a short time." *The Charter and General Laws of the Colony and Province of Massachusetts Bay* 170 (Boston, 1814); see also George Lee Haskins, *Law and Authority in Early Massachusetts* 130 (1960).

When the Copyright Act of 1709, the famous "Statute of Anne," was framed, the drafters insisted on a limited term far more stringent than authors, including John Locke, had proposed; they adopted the fourteen-year limit from the Statute of Monopolies. *See* Mark Rose, *Authors and Owners: The Invention of Copyright* 44-47 (1993). The term provided by the Statute of Anne, fourteen years with a renewal of fourteen years if the author survived the first term, was adopted by First Congress in the Copyright Act of 1790. *See* Copyright Act of 1709, 8 Anne, c. 19; Act of May 31, 1790, 1 Stat. 124-25.

The Framers of the Constitution unanimously accepted the idea of the limited term for copyrights in the drafting of Article I, without substantial discussion. *See* 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 321-325, 505-510, 570, 595 (1937).[2] In doing so, as the subsequent employment in the Copyright Act of 1790 of the term of years from the Statute of Monopolies shows, the Framers and the First Congress acted in full awareness of the long history of attempts to control the harm done by statutory monopolies by limiting their term.

The constitutional importance of the "limited Times" restriction cannot be vitiated, as the Court of Appeals' reasoning would do, by affording Congress the opportunity to create perpetuities on the installment plan, any

[2]The only amendment made was in the replacement of the phrase originally suggested by Charles Pinckney of South Carolina, that monopolies be granted for a "certain" time. *See* 3 *id.*, at 122.

more than Congress can eliminate the constitutional requirement of originality. *Feist Publications, Inc.* v. *Rural Telephone Service, Co., Inc.*, 499 U.S. 340, 346-347 (1991). The Court of Appeals erred fundamentally in its conclusion that there is "nothing in text or in history that suggests that a term of years for a copyright is not a 'limited Time' if it may later be extended for another 'limited Time.' " *Eldred* v. *Reno*, 239 F.3d 372, 379 (CADC 2001). In this regard, the CTEA should not be judged in isolation. The question is whether there is anything in text or history rendering constitutionally objectionable the eleven extensions of the monopoly term in the last forty years, resulting in a virtual cessation of enlargements to the public domain, capped by the statute before the Court, which postpones the reversion on every single existing copyright for decades.

II. The Historical Policy Embodied in the Copyright Clause is Absolutely Essential to Reconcile the Copyright Monopoly with the System of Free Expression

As important as the principle of limited time is in the general restraint of the harms that flow from statutory monopolies, in the area of copyright it has an even more crucial purpose to serve. The limited term of copyright ensures the steady replenishment of the public domain, the vast repository of the common culture of humankind. The public domain is the springboard of societal creativity, the zone of free reproduction and exchange that makes innovation possible. As Yochai Benkler has elegantly shown, the existence of a vital and expanding public domain reconciles the exclusive rights of the copyright system with the underlying goals of the system of free expression protected by the First Amend-

ment. *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U.L. Rev. 354, 386-394 (1999). The Court below erred in its facile dismissal of petitioners' First Amendment concerns. That Court first held in its opinion that the First Amendment's requirements are "categorically" satisfied by the distinction between expression and idea, and then that any material covered by copyright but subject to the defense of fair use is therefore so copiously protected for purposes of free expression that no First Amendment claim can possibly lie. 239 F.3d, at 375-376.

This position simply cannot be right. The Court below conceded that an attempt by Congress to make copyright perpetual *in haec verba* would be prohibited by the language of the Copyright Clause. *Id.*, at 377. But even if the subterfuge of achieving perpetuity piecemeal, by repeated retroactive extensions, somehow evades the plain command of the Copyright Clause, it does not thus render impotent the First Amendment. As the great copyright scholar Melville Nimmer asked:

> If I may own Blackacre in perpetuity, why not also *Black Beauty*? The answer lies in the first amendment. There is no countervailing speech interest which must be balanced against perpetual ownership of tangible real and personal property. There is such a speech interest, with respect to literary property, or copyright.

Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guaranties of Free Speech and the Press?*, 17 UCLA L. Rev. 1180, 1193 (1970).

Nor has the Court of Appeals' position any support in the holdings of this Court. On the contrary, as this Court's cases make clear, copyright and related statutory monopolies in expression must conform like any other regulation of speech to the requirements of the First Amendment. In *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), this Court rejected what it characterized as "a public figure exception to copyright," because it found sufficient "the First Amendment protections already embodied in the Copyright Act's distinction between ... facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." *Id.*, at 560. Thus, the Court said, it found "no warrant" for a further expansion of the doctrine of fair use. *Id.* This by no means implies, as the Court of Appeals somehow concluded, that *Harper & Row* stands as an "insuperable" bar to all First Amendment challenges to all subsequent copyright statutes. *See* 239 F.3d, at 375. In *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522 (1987), this Court applied standard First Amendment analysis to a statute conveying special quasi-trademark protection to the word "Olympic," asking "whether the incidental restrictions on First Amendment freedoms are greater than necessary to further a substantial government interest." *Id.*, at 537 (citation omitted).

The First Amendment abhors the vacuum of limited expression. The making of new works by the criticism, imitation, revision, and rearrangement of existing material is the hallmark of literate culture in all the arts and sciences. The First Amendment establishes not merely a series of independent doctrines, but a "system of free expression." *See* Thomas I. Emerson, *The System of Freedom of Expression* (1970). Our constitutional commitments to an "uninhibited, robust, and wide-open" public debate,

New York Times Co. v. *Sullivan*, 376 U.S. 254, 270 (1964), a "marketplace of ideas," *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 885 (1997); *cf. Abrams* v. *United States*, 250 U.S. 616, 630 (1919), where there shall be no power to "prescribe what shall be orthodox" *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943), require us to view with great skepticism all restrictions on the formation and expression of ideas. Laws tending to establish monopolies in the expression of ideas must pass the exacting scrutiny that protects our most fundamental freedoms. The Copyright Clause does not exempt the legislation enacted under it from such scrutiny, but rather establishes principles that enable statutory monopolies and freedom of expression to coexist. Of these, the principle of limitation in time is far from the least important. By refusing to consider the effect of the instant legislation in the broader context of a Congressional policy of piecemeal, indefinite, wholesale extension of copyrights, and in relation to the purposes established by the Copyright Clause itself, the Court of Appeals failed in its duty to protect the invaluable interests of the system of free expression.

A. Indefinite Extension of the Term of Monopoly on Existing Works of Authorship is Incompatible with Both the Copyright Clause and the First Amendment

Precisely because the creation of exclusive rights in expressions inevitably involves some danger of the monopolization of ideas, it is crucial to the coexistence of copyright and the First Amendment that all exclusive rights over expressions are limited in time. At some specific moment, all exclusionary rights must end. Under

our Constitution, the reversion of every work of authorship is irrevocably vested in the public.

This reversion is not constitutionally optional. In the context of patents, this Court has described the reversion as a "condition" that the work subject to temporary statutory monopoly will pass into the public domain upon the patent's expiration. *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U.S. 169, 185 (1896).

Notwithstanding this evident constitutional principle, the Court of Appeals held that Congress may create a perpetuity in copyrights so long as it does so sequentially, by repeatedly extending all existing copyrights for nominally "limited" terms. This holding contradicts the spirit of both the Copyright Clause and the First Amendment. The Court of Appeals erroneously held, following its own precedent, *see Schnapper* v. *Foley*, 667 F.2d 102, 112 (1981), that the single phrase comprising the Copyright Clause, empowering Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," imposes no substantive limitation on Congress through its declaration of purpose. But the Court of Appeals acknowledged, as it must, that this Court's cases show clearly that Congressional power is indeed limited by the Copyright Clause, and so its effort is bent to the disintegration of a single phrase of twenty-seven words, directed at showing that the first nine are somehow constitutionally irrelevant.

This Court first held in the *Trademark Cases*, 100 U.S. 82 (1879), and reaffirmed in *Feist*, *supra*, 499 U.S., at 346-47, that Congress cannot constitutionally dilute the requirement of originality, by extending copyright coverage to works of authorship that make use of expressions already in existence, or in which the author's effort in collection and arrangement of existing information does

not establish that "modicum of creativity" the Constitution requires. According to the Court of Appeals, however, the principle of originality emerges solely from the words "Writing" and "Author," taking not the slightest support from the declaration of purpose that begins the Copyright Clause.

The Copyright Clause is unique among the enumerations of legislative power in Article I, §8 in containing a declaration of purpose; it alone "describes both the objective which Congress may seek and the means to achieve it." *Goldstein* v. *California*, 412 U.S. 546, 555 (1973). Adopting a reading of the clause that denies legal effect to the words the drafters specifically and atypically included is an implausible style of constitutional construction.

Even without reference to the beginning of the clause, however, this Court's prior opinions show that the Court of Appeals has misperceived the task of construction. The Court of Appeals treats the words "limited Times" in purely formal terms, so that—after ten previous interlocking extensions beginning in 1962, holding substantially all works with otherwise-expiring copyrights out of the public domain for a generation—the CTEA's extension of existing terms for another twenty years raises no substantive constitutional question because the new twenty-year extension period is numerically definite. The same formal, anti-contextual approach to the words would result, however, in the result rejected by this Court in *Feist*: telephone directories are undeniably "writings" in the same crabbed sense that the term extension contained in the CTEA is "limited."

B. The Fifth Amendment Prohibits Legislative Action Such as This With Respect to Physical Property Rights, and There Is No Constitutional Justification for Permitting What Cannot Be Done with Mere Property to be Done with Free Expression

On the logic of the Court of Appeals' holding, which is apparently supported in this Court by the Solicitor General, Congress could pass a statute shortening the term of existing copyrights, reallocating a large body of currently-covered works to the public domain. If the statute simply provided that the term of copyright be reduced to fourteen years, according to the Court of Appeals, that would satisfy the requirement of "limited Times," and there would be no occasion for the Courts to inquire into whether such a change promoted the progress of science and the useful arts, though copyright holders could well be expected to contend that such an alteration of the duration of existing copyrights deprived them of the benefit that the "copyright bargain" supposedly "secures" them.

But the copyright bargain faces two ways: "securing" authors their limited monopoly in return for the reversion to the public. Increasing the reversionary interest at the expense of the first estate is conceptually no different than increasing the copyright holder's monopoly at the expense of the reversionary interest, which is that of the whole society and the system of free expression. Shrinking or eliminating the public domain in order to increase the benefit to the monopolists, whose works have already been created in reliance on the previous allocation of rights, neither promotes the progress of knowledge nor respects the critically-important free speech interest

in the health of the public domain.[3]

Nor would the Takings Clause of the Fifth Amendment permit such uncompensated legislative adjustment of the terms of interest in real property. Copyright—not surprisingly in view of its common law origins—adopts an essentially familiar structure of "estates" in works of authorship, beginning with a conveyance for term of years or a life interest plus a term of years, with a reversion to the public domain. This Court has held that legislative alteration of such estates that destroys or limits the reversionary interest in real property in order to achieve redistribution between private parties is "public use" within the meaning of the Takings Clause, and is constitutional if compensated. *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984). But it has never been suggested that Congress or a state legislature could achieve a similarly vast wealth transfer to present lessees through the extension of the terms of all existing leases, extinguishing or indefinitely postponing the reversionary interest, without paying compensation.

What the Fifth Amendment prohibits with respect to interference with existing rights in real property should not be permissible where the rights being destroyed by

[3]The Court of Appeals minimized the importance of the impoverishment of the public domain when it maintained that "[p]reserving access to works that would otherwise disappear—not enter the public domain but disappear—'promotes Progress' as surely as does stimulating the creation of new works." 239 F.3d, at 379. This is an apparent reference to claims made by copyright holders in the legislative process that certain classes of works, particularly films, would not be physically preserved unless the copyright monopoly were extended. It is sufficient to point out that such a principle for the award of copyright monopolies conflicts with the constitutionally mandated requirement of originality: Congress cannot elect to preserve books, films, or music by conveying to the conservator a statutory monopoly of copying and distribution lasting decades.

legislative changes in property rules are rights to the freedom of speech and publication. The Court of Appeals dismissively viewed petitioners as seeking to enforce rights to use the copyrighted works of others. 239 F.3d, at 376. On the contrary, petitioners claim only their constitutional entitlement to use the works that would have entered the public domain, as required by the law in effect at the time the particular statutory monopolies at issue were granted, had it not been for unconstitutional Congressional interference.

III. Particular Dangers of Abuse and Corruption Justify Strict Constitutional Scrutiny When the Term of Statutory Monopolies is Extended

During the first century of our Republic, the term of copyright was extended once. During the next seventy years, it was extended once more. Since 1962, copyright terms have been extended regularly, in increments ranging from one year to twenty years, and the flow of US-copyrighted works into the public domain has nearly ceased. The statute before this Court postpones rights in material protected by the First Amendment to any but the holders of statutory monopolies for an additional generation.

No pattern of legislation could more clearly indicate the presence of the very evils against which the Framers of the Constitution and their forebears contended, and which gave rise to the Copyright Clause and its requirement for "limited Times." When our predecessors in the struggle for constitutional liberty perceived a danger from corruption in the grant of monopolies, the danger they apprehended was from the executive, which might use its power to grant such monopolies to raise money

independent of the legislature. In our time the risk is that the legislature, which is granted the power to create such monopolies by Article I, §8, will use that power to benefit copyright holders at the expense of the public domain. Such a purpose—to turn the system of free expression into a series of private fiefdoms for the benefit of monopolists, who may choose to rebate a small portion of the monopoly rents thus extracted from the population in the form of campaign contributions—is forbidden to Congress by the plain wording of the Copyright Clause and by the First Amendment. The use of repeated interim extensions to achieve the effect of a perpetuity is not less dangerous than the single enactment that all parties concede would be unconstitutional. On the contrary, such a legislative practice increases the dangers of corruption without reducing the harm to the public domain.

Conclusion

Perhaps the late Representative Bono did indeed believe that copyright should last forever. That any legislator could hold that view suggests the degree of danger to a fundamental part of the system of free expression into which we have drifted. This Court should hold that the extension of existing copyright terms in the CTEA violates the requirements of the Copyright Clause and the First Amendment. The decision of the Court of Appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
in his official capacity as Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF HAL ROACH STUDIOS & MICHAEL AGEE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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STATEMENT OF INTEREST

This brief *amici curiae* in support of Petitioners is submitted under Rule 37 of the Rules of this Court by Hal Roach Studios and by Michael Agee, its Chairman.[1] Mr. Agee is recognized as one of the leading film restorationists in the country, and has devoted his professional life to the restoration of fragile and classic film and television productions. Hal Roach Studios is one of the leading restorers and proprietors of pre-1930 films. Under Mr. Agee's direction, it has restored and holds rights to collections such as the pre-1931 Laurel and Hardy archive, as well as over sixty of the pre-1931 Hal Roach comedies. Mr. Agee himself restored the entire Laurel and Hardy "talking" body of work, comprising forty "shorts" and twelve feature films. Amici submit this brief in order to increase the Court's understanding of the ways in which the Copyright Term Extension Act frustrates the process of film preservation and restoration, impedes commercial and non-commercial attempts to give access to the nation's film heritage and restricts expression and preservation in a manner inconsistent with the Copyright Clause and the First Amendment.

SUMMARY OF ARGUMENT
"A POSTERITY THAT NEVER QUITE ARRIVES"

The Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827, extends the term of existing copyrights by twenty years. This portion of

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief. Assistance in the preparation of this brief was provided by the Program in Intellectual Property and the Public Domain at Duke University School of Law, and in particular by Senior Fellow Daphne Keller.

the statute exceeds the limits of the Copyright Clause's grant of power. It is also subject to heightened First Amendment scrutiny, a scrutiny that it cannot meet.

Though several justifications for retrospective term extension are offered in the legislative record, only one has even an arguable connection to Congress's power under the Copyright Clause: that retrospective term extension is necessary to provide copyright holders with incentives to maintain, restore and digitize fragile works, particularly motion pictures. It is thus not surprising that much stress has been laid on the preservation rationale; this is the only possible justification of the retrospective portion of the CTEA. But possible does not mean actual. Both legally and factually, the preservation rationale, too, turns out to be fatally flawed.

In this brief, amici show that the preservation rationale is outside of the Copyright Clause's grant of power, and that restoration of a few works in one medium cannot be a constitutional basis for extending the copyrights of all works in all media. However even if the preservation rationale were within the boundaries of the Copyright Clause, the effects of the CTEA run in exactly the opposite direction. Review of the actual world of film restoration and preservation reveals that the undeniable effect of the CTEA is to sequester an entire generation of American culture while actively harming film preservation efforts. The CTEA directly impedes restoration of the numerical majority of American films, the so-called "orphan works", the very portion of our film heritage which the Library of Congress identifies as being in the most urgent need of restoration. *Report of the Librarian of Congress, Film Preservation 1993: A Study of the Current State of American Film Preservation*, 5 (1993) [hereinafter "*Librarian of Congress Report*"]. Those who would preserve, restore and digitize this body of works are prevented from doing so by the tangle of rights surrounding the films. The clean blade of term expiration was supposed to cut through this thicket; the CTEA fertilizes it and extends

it instead. The majority of commercial feature films owned by major studios fare little better. In each case, the CTEA's effects are particularly tragic because many of the films at risk will not survive for another twenty years. This error is not reversible.

At the same time, the CTEA impedes access to, and productive use of, the enormous holdings of film in the nation's archives. Films restored at the public's expense are now kept inaccessible to the public for *another* twenty years. In 1993 the Librarian of Congress's report on film preservation observed ruefully that because of the legal restrictions on making films available, "[f]or many of those seeking copies of films, archivists can look as if they are perversely saving films for a posterity that never quite arrives." *Librarian of Congress Report, supra,* at 47. Thanks to the CTEA, posterity will be postponed for another twenty years.

"Copyright", this Court has said, "is the engine of free expression." *Harper & Row v. Nation Enter.*, 471 U.S. 539, 558 (1985). As such it is sometimes mistakenly thought to be immune from First Amendment scrutiny. The Court below took this view. But in this case, the engine has run and has produced its products. The retrospective portion of the CTEA is a naked state restriction of expressive conduct, a restriction which does not pretend to produce incentives for original expression. Therefore it is subject to heightened First Amendment scrutiny, scrutiny which it cannot meet. Even if film restoration were an important government interest within the range of Congress's copyright power, and even if the CTEA furthered that goal rather than dramatically setting it back, the retrospective portion of the CTEA could hardly be said to achieve its goal in a manner no more restrictive than necessary. It locks up an entire generation of American culture, all original works in all media, in order to try – and fail – to save a tiny minority of works in one medium.

ARGUMENT

I. The Copyright Clause imposes limits on Congress's power to create exclusive rights. Those rights must be for limited times and must promote the progress of science. The CTEA's retrospective term extension is outside of those limits and is therefore unconstitutional.

The Constitution gives Congress the power to "promote the Progress of Science" by granting "exclusive Right[s]" "to Authors" for "limited Times." U.S. Const., art. I, § 8, cl. 8. This clause is both "a grant of power and a limitation." *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966). The CTEA extends the term of existing copyrights by twenty years. Retrospectively extending the term of existing copyrights does not "promote the Progress" and falls outside the limitations imposed by the Constitution. The copyrighted works already exist; clearly the legal monopoly was sufficient to encourage their creation. In extending this monopoly over existing works for another twenty years, Congress is not offering incentives for the creation of original work. It is simply granting windfall profits with one hand while restricting expressive activity with the other. Neither the Copyright Clause nor the First Amendment countenances such action.

A. The only congressional justification for retrospective term extension that is potentially relevant to "promot[ing] the Progress" is the film preservation rationale.

Precisely because the retrospective extension of existing rights has no connection to the constitutional goals of the Copyright Clause that is "visible to the naked eye", Congressional findings about the goals of the statute assume greater importance. *United States v. Morrison*, 529 U.S. 598, 614

(2000). Congress declared a number of purposes behind the CTEA, ranging from the constitutionally risible (providing for two generations of the author's heirs) to the questionably international (harmonization with the European Union). Even as to the prospective portion of the CTEA, amici would argue that these purposes are not sufficient to meet the standards set up by the Copyright Clause or the First Amendment; as to the retrospective portion they offer no justification whatsoever. Retrospective "harmonization" does not induce greater creativity in the past. Even if one believed that increased generosity to an author's heirs would yield greater incentives for the future, extension of the copyright term over existing works provides no incentive effect at all.

Congress provides only one finding that could logically relate retrospective term extension to promoting progress, namely that term extension is supposed to create "incentives to preserve existing works", particularly film.[2] In fact, the

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[2] S. Rep. No. 315, at 13, 104th Cong. 2d Sess. (1996). Thirteen of the thirty-seven pieces of testimony given during the Senate and House hearings on copyright term extension referred to preservation problems. Of those thirteen, all but three exclusively addressed film preservation. The remainder talked generically about preserving "works." *See Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989 Before the Subcomm. on Courts and Intellectual Property, House Comm. on the Judiciary*, 104th Cong. (1995); *Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Judiciary Comm.*, 104th Cong. (1995); and *Pre-1978 Distribution of Recordings Containing Musical Compositions, Copyright Term Extension, and Copyright Per Program Licenses: Hearings Before the Subcomm. on Courts and Intellectual Property, House Comm. on the Judiciary*, 105th Cong. (1997). In fact, film is the only medium which presents the combined problem to which term extension is supposed to be the solution; the problem of a particularly volatile medium prone to rapid degeneration coupled with a comparatively high cost of restoration and digitization. To a much lesser extent, analog audio tapes present some similar problems, but both the scope of the danger and the cost of remedying it are lower. The preservation and digitization issues really revolve around film and it is there that the remainder of the brief's analysis will concentrate.

Court of Appeals emphasized this finding in reaching its decision below:

> The Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration . . . If called upon to do so, therefore, we might well hold that the application of the CTEA to subsisting copyrights is "plainly adapted" and "appropriate" to "promot[ing] progress." *Eldred v. Reno*, 239 F.3d 372 at 378-79 (D.C. Cir. 2001) (alteration in original, citations omitted).

The film preservation rationale thus assumes particular importance in this case. It is there, and only there, that we find an argument that extending copyrights on existing works is necessary in order to achieve a constitutionally appropriate goal. As the discussion below will demonstrate, however, this argument is deeply flawed, both legally and factually.

B. The film preservation rationale is logically and legally unsound.

1. Giving incentives for film preservation through retrospective term extension is not within the ambit of Congress's power to promote the progress of science by encouraging the creation of original works.

Congress has numerous available methods to encourage film preservation, ranging from tax subsidies to the creation of state archives. However, it may not use a retrospective extension of exclusive rights under the Copyright Clause to accomplish this goal. In the patent context, this Court has held that it is unconstitutional to remove material from the public domain. *Graham*, 383 U.S. at 4. Why? In part it is because the works already exist. The extension of an intellectual property right to an existing work does not encourage the creation of original expression or novel invention. Instead it acts merely as a reward for socially useful labor. If "encouraging restoration" is a valid goal under the Copyright Clause, it is hard to see what remains of the rationale behind *Graham's* limitation. Again, the works already exist and Congress is trying to provide incentives in order to encourage some socially desirable investment of sweat and capital.

The same point is made in this Court's copyright jurisprudence. This Court has held that unoriginal compilations of material may not be copyrighted; "sweat of the brow" protection lies outside the ambit of the Copyright Clause. *Feist Publications, Inc. v. Rural Telephone Co.*, 499 U.S. 340 (1991). Yet retrospective extension of copyright over existing works does something that is indistinguishable in principle from these forbidden uses of the patent and copyright power. The only restorations which have need of the CTEA are those which are unoriginal; if they were original, a new copyright term would be available and term extension therefore would be unnecessary in order to encourage them. Retrospective extension gives no incentive to create original works; the only incentive is for the straightforward labor and investment involved in restoration. Therefore, as has been noted in the scholarly literature,[3] Congress is conferring a de facto "sweat of the brow" protection on existing works. As amici will describe below, it is also doing so in a way that undeniably harms rather than helps the task of film preservation for the majority of American films.

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[3] L. Ray Patterson, *Eldred v. Reno: an Example of the Law of Unintended Consequences*, 8 J. Intell. Prop. L. 223, 235-6 (2001).

2. The argument that the CTEA is justified by the need to encourage digitization and "media migration" is an argument without a limiting principle and thus flies in the face of this Court's recent holdings.

According to the Congressional findings, the continuing exclusive rights guaranteed by extension of copyright will give copyright holders an incentive to invest in restoring films and transferring them to new digital media. But as a basis for Congressional power, this is a rationale with no limiting principle. There will always be new media onto which we need to move our older cultural works. Indeed, the Librarian of Congress's Report makes clear that no known medium represents a "stopping point" for preservation or distribution of film. The Report expressed great concern about the rapid obsolescence of digital media and noted that proposed HDTV standards capture less than half of the visual information from a 35 mm film frame.[4] *Librarian of Congress Report, supra*, at 15-16. If inevitable changes in media are grounds for term extension, Congress may rely on the same rationalization every twenty years to justify moving asymptotically towards perpetual copyright (a goal that the sponsor of the legislation reportedly favored).[5]

The "media migration" justification for retrospective

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[4] The Report noted that in video alone, "at least six major incompatible formats have evolved into obsolescence the last 20 years." *Librarian of Congress Report, supra*, at 16.

[5] "Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also [Motion Picture Association of America President] Jack Valenti's proposal for a term to last forever less one day. Perhaps the Committee may look at that next Congress." 144 Cong. Rec. H9952 (1998) (statement of Congresswoman Mary Bono).

term extension eviscerates the "limited times" restriction of the Copyright Clause and flies in the face of this Court's recent jurisprudence. This Court has recently stressed that basic canons of constitutional construction militate against accepting *types* of justification for Congressional action which logically eliminate "judicially enforceable outer limits" on Article I powers. *Morrison*, 529 U.S. at 610. In this case, the "media migration" justification would support limitless term extension. Like the claims of Congressional authority rejected in *Morrison*, the CTEA relies on "a method of reasoning that [would fail] to maintain the Constitution's enumeration of powers." *Id.* at 615. In addition, Congress may not rely on "attenuated" links between legislation and Congress's constitutional authority. *Morrison*, 529 U.S. at 612 (citing *United States v. Lopez*, 514 U.S. 549, 563-567 (1995)). The CTEA's digitization and media migration rationale has only the most attenuated relation to the Copyright Clause power, and allows for a new retrospective extension with each change in format, thus making a mockery of the limited times requirement. To borrow a phrase from the law of standing, the practice would be "capable of repetition, yet evading review." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

3. Even if term extension did inspire film preservation, this would not be sufficient reason retrospectively to extend the copyright term in *every* medium.

Although Congress alluded to a range of existing works, the legislative record makes clear that only a single body of material affected by retrospective term extension is under urgent threat of physical decomposition or in need of expensive digitization: motion pictures. Yet copyright covers "works of authorship" across a wide range of fields: literary works, music, drama, sculpture, computer programs, sound recordings, pantomime and dance. 17 U.S.C. § 102 (2000).

Even if the Congress were correct in its claims about the effect of term extension on movie preservation and digitization, one can hardly justify extending the term of every subsisting copyright over every type of work in order to preserve works of single industry, in a single medium. Such an extension – even if it *were* truly effective as to film – is plainly not adapted or appropriate to promoting overall progress. This point is perhaps the most important of all. As was argued earlier, the only legislative purpose given in the record which both justifies retrospective term extension and has an arguable connection to Congress's power under the Copyright Clause is the film preservation rationale. But Congress may not use a claim that the CTEA will help preserve films, a fraction of American cultural production, as a basis for placing an entire generation of culture off-limits for an additional twenty years.

C. The CTEA actually impedes public access to our film heritage and hurts film preservation, restoration and digitization.

1. Copyright term extension does not promote film preservation but instead reduces preservationists' incentives and limits public access to films.

This Court has repeatedly held that the purpose of copyright lies in "the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). This benefit, it has explained, depends on public *access* to works of authorship – copyright "must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." *Aiken*, 422 U.S. at 156. Without access, the public does not receive the benefit of the copyright bargain – individuals can neither experience the works as consumers nor become add-on

innovators after term expiration.

For early twentieth century American film, copyright law plays a major role in *preventing* "broad public availability" and in deterring preservation efforts that might make films available in the future. The rare remaining copies of these rapidly deteriorating works are often held by individuals or archives which, because of copyright law, are forbidden from copying and distributing the films to the public; as a result, these neglected films simply rot on the shelf. Of the tens or hundreds of thousands[6] of movies made before 1950, fully 50% are irretrievably lost. *Librarian of Congress Report, supra*, at 3.[7] For films made before 1929, the loss rate is far worse: 80% of films of the 1920's, and 90% of films from the 1910's are gone. *Redefining Film Preservation: A National Plan; Recommendations of the Librarian of Congress in Consultation with the National Film Preservation Board* 23 (Annette Melville & Scott Simmon eds., 1994) [hereinafter *Librarian of Congress Recommendations*].[8] The physical properties of film stock are partly responsible for this tragic attrition. Nitrate film reels were famously combustible.[9] Early distributors' practice of destroying their older films, sometimes to salvage silver content from the nitrate stock, further contributed to the rate

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[6] By 1917, over 30,000 films had been made. Charles H. Tarbox, *Lost Films: 1895-1917* 3 (1983).

[7] The Library of Congress points out that this statistic needs to be qualified by the fact that it applies to feature films; other forms of film fared worse. Silent films did more poorly than the 50% figure would suggest while sound pictures did better. *Librarian of Congress Report, supra*, at 3.

[8] *See also* Frank Thompson, *Lost Films: Important Movies That Disappeared* ix (1996).

[9] Anthony Slide, *Nitrate Won't Wait: A History of Film Preservation in the United States* 3 (1992); Doug Herrick, *Toward a National Film Collection: Motion Pictures and the Library of Congress*, 13 Film Library Quarterly 5, 9 (1980).

of loss.[10]

The cost of copying unique reels of pre-1951 nitrate film alone is estimated at $243 million. *Librarian of Congress Report, supra*, at 56. But nitrate film is far from alone in needing restoration; so-called "safety" film is also subject to acetate-base decay, *id.* at 8-9, and "virtually all of the images captured on film [are] susceptible to similar loss within the next century or two." [11]

In the U.S., about 100 million feet of unique nitrate film, and untold amounts of "safety" film, remain unrestored.[12] A small amount is held by studios – as of 1993, Universal held 2300 feature films, MGM 1800, Fox 4000. *Librarian of Congress Report, supra*, at 18 fig.4. Much more is in large public archives – the 1993 figures show the Library of Congress holding over 150,000 titles, UCLA Film & Television Archive 46,000, the Museum of Modern Art 13,000. (These figures include non-feature films as well.) *Id.* at 26-27 fig.5. And untold numbers of films are scattered in private hands or small public collections – one expert estimates that some 1750 separate small collections hold unique or difficult-to-find footage. *Id.* at 29-30. For innumerable 20th century films, only a single tattered copy remains.

Preservation of deteriorating film is costly. In 1992, preservation of a ninety minute black-and-white silent feature cost an average $10,222. *Id.* at 41 fig.9. Storage, too, is very expensive, in part because films must be kept under conditions of controlled temperature and humidity. In some cases, studios negotiated donations to archives, effectively shifting storage and preservation costs while retaining copyright control. *Transamerica Corporation v. United States,*

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[10] Herrick, *supra* note 9, at 11; Charles Grimm, *A History of Early Nitrate Testing and Storage, 1910-1945*, The Moving Image 21, 22 (2001).

[11] Michael Friend, *Film/Digital/Film*, 24 J. Film Preservation 36, 36 (1995).

[12] Slide, *supra* note 9, at 5.

902 F.2d 1540 (Fed. Cir. 1990). In other cases, studios which hold copyrights did not themselves retain physical copies of the films and do not necessarily have legal access to those copies which are extant. Universal, for example, destroyed "all but a handful of their silent negatives" in 1948;[13] most of the few remaining copies of the studio's pre-1929 works owe their survival to collectors or flukes of history.

This separation of physical control from copyright ownership is highly damaging both to preservation efforts and to the public's ability ever to *see* the preserved films. *Librarian of Congress Report, supra*, at 24-25, 32. It ensures that the entity with restoration expertise, interest and actual possession of the film lacks any economic incentive to restore because copyright law will prevent sharing of the work with others. (Libraries and archives have limited rights to copy deteriorating works, but cannot distribute them. 17 U.S.C. §108 (2000)). Even if the copyright holder both knows and cares about the film, it cannot undertake restoration because it possesses no physical copy. In the words of one highly respected archivist, "[a]rchives will be allowed to restore [films] (as restoration itself does not require the permission of the copyright owner), but then they will have to pay in order to exhibit them to the public, even if the legitimate owner did nothing to protect the physical integrity of their assets."[14] The Museum of Modern Art began its collection in the 1930s, obtaining films under a contract which left copyright with production companies.[15] Of the 13,000 titles

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[13] David Pierce, *The Legion of the Condemned: Why American Silent Films Perished*, 9 Film History 5, 9 (1997); *see also* G. Myrent & G.P. Langlois, *Henri Langlois: First Citizen of Cinema* 29 (1995).

[14] Glenn Myrent, *Ma vie d'architecte paysagiste: entretien avec le conservateur de la George Eastman House* (interview with Paolo cherchi Usai, Senior Curator of the George Eastman House), 19 Cinémathéque 3, 24 (Spring 2001).

[15] Herrick, *supra* note 9, at 12.

it held by 1993, less than half were available for viewing even by researchers. *Librarian of Congress Report*, *supra*, at 26-27 fig.5. Similar figures obtain elsewhere: visitors and researchers can see only 40% of the Northeast Historic Film Archive's holdings, for example. *Id.* Under these circumstances, many copyrighted works have been lost to decay, while others have been restored at public expense yet remain unavailable to the public.

It is important to stress here the profoundly negative effect that the CTEA has had and will have on public film restoration efforts. Over fifty percent of the public AFI-NEA grant money spent by 1993 went to restore pre-1929 works. *Librarian of Congress Report*, *supra*, at 35. Films from 1923-1927 were to have passed out of copyright by this year; instead, the CTEA keeps them off limits until 2018 at the earliest. As the Library of Congress Report noted, because of the legal restrictions on making films available, "[f]or many of those seeking copies of films, archivists can look as if they are perversely saving films for a posterity that never quite arrives." *Id.* at 47. This result furthers neither the Copyright Clause's goal of granting access, nor the more specific goal of encouraging effective film preservation.

In sum, for the vast majority of these deteriorating films, continued copyright protection actually deters preservation. It locks up publicly restored films for an additional twenty years and denies those few individuals and archives with the incentive and capacity to restore a neglected film the legal right to distribute their work. The CTEA therefore effectively ensures that many works will fall to dust before the public ever gains the access that is copyright's goal.

2. Copyright term extension undeniably deters or impedes preservation of the numerical majority of deteriorating films, the "orphan" works.

The Congress did not err in believing that there is a preservation crisis in American film. The CTEA, however, is

aimed at precisely the wrong target and manages in the process to make it harder to solve the problems that actually exist. According to the Library of Congress's 1993 *Report on the Current State of American Film Preservation*, the ongoing preservation crisis does not primarily affect famous and marketable Hollywood features. *Id.* at 2. These works constitute a relatively small proportion of the surviving film population and are already the objects of substantial preservation efforts.[16] Indeed, the Librarian of Congress noted that "preservation efforts directed largely toward the Hollywood feature seem shortsighted" in light of the ongoing loss of less glamorous, but historically important works. *Id.* Rather, the works in most urgent need of preservation are "orphan" films – "films of long-term cultural and historical value that are not being protected by commercial interests." *Librarian of Congress Recommendations*, *supra*, at 25. Orphan films are "numerically the majority" of the movies remaining in our film legacy, and constitute a vital section of our cultural history. *Librarian of Congress Report*, *supra*, at 5. They include documentaries, newsreels, independent productions, rare historic footage documenting daily life for ethnic minorities, "certain Hollywood sound films from now defunct studios," *id.*, and other commercial works "whose owners are unwilling or unable to provide long-term preservation." *Librarian of Congress Recommendations*, *supra*, at 26. The Library of Congress declared that it is in the task of restoring these "orphan films" that "the urgency may be greatest." *Librarian of Congress Report*, *supra*, at 5.

It is hard to overstate the importance of this point. Obviously, term extension provides no incentive to restore orphan and abandoned films. In many cases, the orphan films have no identifiable owners. The owners who have abandoned their films over a period of seventy-five years are not about to reclaim and refurbish them when that period is

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[16] Slide, *supra* note 9, at 6, 152.

extended to ninety-five. Worse still, those who might otherwise restore orphan films will actually be deterred by term extension from doing so. The copyright status of films from the relevant period is often profoundly uncertain. The films are often covered by multiple overlapping copyrights, all of which have to be cleared. There are rights over the film, over the soundtrack and so on.[17] It can be practically impossible to identify successors in interest, or to trace every possible transfer and assignment of copyrights over a period of more than seventy-five years. Thus, even though a film may in fact be in the public domain, or have been "abandoned" by an owner who is either willing to relinquish all rights, or who simply long ago lost track of and interest in the film, both commercial and non-commercial entities may be unwilling to restore or preserve it. Copyright is a strict liability system and the cost of defending or insuring against liability, or paying large legal fees to research and clear a complicated tangle of rights, is simply too great. The clean blade of term expiration is supposed to clear away this legal thicket; the CTEA leaves it in place. Far from encouraging the preservation, restoration and digitization of motion pictures, the CTEA will leave the golden years of the American movie industry rotting in the can, or surrounded by a tangle of poorly documented copyright claims which, through the uncertainty brought by time and legal complexity, impede both commercial and non-commercial use.

This inhibiting effect of lengthened copyright terms on both public access and restoration efforts is no mere speculation. Some archives simply do not release films until enough time has passed for the copyright term to expire. *Librarian of*

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[17] *It's a Wonderful Life* may provide the best-known example of this legal complexity. The film itself entered the public domain in 1974, but Republic Pictures used rights over the underlying short story and the soundtrack to prevent unauthorized television broadcast and videocasette distribution of the film. *See* Steven Schiffman, *Movies in the Public Domain: A Threatened Species*, 20 Colum.-VLA J.L. & Arts 663, 671-72 (1996).

Congress Report, *supra*, at 48-49. Until now, this has meant that access and distribution had to wait seventy-five years. Now they must wait ninety-five, frequently well beyond the effective life of the media on which the films are stored. Given the liability that archives could incur, and the expense and complexity of researching the copyright, this blanket denial of access is economically rational for underfunded archives. But it hardly serves copyright's constitutional goal of "promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). And it certainly undermines Congress's asserted goal, with the CTEA, of encouraging film preservation. Discussing some of the similar difficulties introduced for stock footage libraries by automatic term renewal, the Library of Congress's *Report on Film Preservation* noted, that because of the difficulty and expense of ascertaining the copyright status of the films in question, the effect of such legal changes is to make it commercially infeasible to restore, use or digitize films that in all likelihood are "abandoned." *Id.* at 22. The CTEA simply continues and expands these impediments. These effects might be acceptable in an otherwise constitutionally unremarkable copyright statute. In a copyright statute which relies heavily for its constitutionality on its beneficial effect on film preservation, they are not.

It is undeniable that, but for the CTEA, any film from before 1927 would be freely and clearly available for any institution, company or individual to copy, restore, digitize or transform. No lawyer would have to be consulted, no tangle of rights negotiated, no copyright insurance procured. But for the CTEA, by 2018, all films made before 1943 would be available in this way. It is also undeniable that after the CTEA, the expense and trouble involved in clearing copyright is considerably higher for every year to which the Act applies, even for those films that have in fact been "abandoned" by their owners. Thus, in a tragic irony, the CTEA's undeniable effect on the majority of American films for the relevant period, the films for which the urgency of the task

of restoration is the greatest, is to make preservation and restoration harder, more expensive and often completely impracticable.

3. The CTEA's term extension does not effectively spur restoration or digitization for the remaining minority of American films.

It was pointed out earlier that the predominant effect of term extension is to restrict public and archival access to films of the period. In addition, as was just shown, the CTEA demonstrably harms the project of preservation, restoration and digitization of orphan works. But the law's effect on the remaining portion of our film heritage, those films with some potential for protection by commercial interests, is hardly better. U.S. movie studios retain substantial holdings over feature films from 1923-1929, the blockbusters of their day. It is believed that some 1400 silent feature films were released in those years, of which about 1200 remain under copyright.[18] According to the Internet Movie Database, only 63 of these films are commercially available on DVD.[19] These documents of the silent era's end were to have entered the public domain by 2004; thanks to the CTEA, they will be sealed to all but a few archivists for another twenty years.

Beyond its obvious potential for undermining the restraints that the Framers so carefully wrote into the Copyright Clause, the CTEA's restoration rationale is implausible even when applied to the tiny minority of films for which it could possibly work, namely those with both identified owners and commercial potential.

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[18] Unpublished data courtesy of the archive of Dr. Jon C. Mirsalis. Correspondence on file with amici.

[19] These figures come from the Internet Movie Database's Advanced Search Page, at http://us.imdb.com/list, which allows users to search by year and by current release format (last visited May 7, 2002).

Studios hold rights to a giant backlog of feature films. *Library of Congress Report supra* at 18 fig.4. Even if films from seventy-five years ago had the kind of high return favored by the major film studios, which they do not, term extension cannot possibly hope to provide incentives to restore and digitize more than a tiny fraction of these holdings. The concentration of the film industry in recent years has left many of the copyrights to the feature films of the past in the hands of a few companies. As of 1989, nine major studios held a 95% share of the U.S. domestic market for theatrical film exhibition.[20] A wave of mergers has since reduced the number of major studios still further. Even with the expansion of potential programming provided by digital cable TV and the multiplication of channels, there is a limit to the amount of material that a company might reasonably digitize and release, or license to others, without cannibalizing its own business. The flow of restored works from major copyright-holders could never be more than a trickle. For decades, eight major studios kept up a release rate of roughly one new feature per week. IV *Report of the Librarian of Congress, Film Preservation 1993: A Study of the Current State of American Film Preservation: Submissions*, 62 (1993) *(Submission of The Committee for Film Preservation and Public Access)*. If, every year, one quarter of all releases onto DVD were to be devoted to films from seventy-five years ago – a ludicrous proposition – it would hardly put a dent in the accumulated libraries of the major studios. Even if a larger output could be maintained and the studios were able to switch their business model from making new films to refurbishing old ones, this would hardly serve the constitutional goal of promoting original expression!

The market-driven, monopoly right-of-exclusion, business model is unlikely to provide the incentives for

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[20] 10 Stephen Prince, *History of the American Cinema*, 1980-1989, at 41 (2000).

anything even like that rate of release, particularly when the studios face the danger of diverting audiences from their own contemporary products. There is a simple reason for this; today's TV and video marketplace is more segmented than it was, but still responds much better to volume of preference than to intensity of preference for a particular entertainment product. In most cases it is the number of viewers, rather than the avidity with which they devour the images on the screen, that drives the market. There *are* those who are passionate about old film, those who might well be willing to invest the time and money necessary to restore, digitize or make derivative works from a wide range of our older films if they did not have to pay the post-CTEA copyright tax to do so: the fan who devotes years to restoring fragments of Buster Keaton's work, the small company that re-releases public domain movies with commentary and scholarly apparatus, the Foundation that wishes to restore the works of the great African-American producer Oscar Micheaux, the archive which attempts to bring public domain classics to the Internet. But though those groups, prominently including both plaintiffs and amici in this case, have shown demonstrable interest in restoration and digitization, their passion does not translate into a workable market to which the movie studios can sell copyrighted entertainment.

The contemporary Internet is a shining example of the power of distributed, non-profit, and volunteer labor to provide global information and culture. There are small companies specializing in public domain films, and conspicuous public restoration programs. The Library of Congress has the largest film collection in the world,[21] many of the films painstakingly restored at public expense. The fruits of this public restoration could be available to all. Internet archiving, volunteer digitization, public domain film compa-

[21] Herrick, *supra* note 9, at 6.

nies, federally funded restoration: each has its place in saving America's films. But these are also exactly the types of activity that term extension either forecloses, or leaves fruitless. Term extension gives the parties who are unlikely to restore and distribute films the exclusive right to do so, while denying rights to parties with demonstrated interest and capability. And it does so even within the commercial sphere, the area that is supposed to provide the strongest case for the power of term extension to spur restoration.

4. The CTEA effectively undermines the deposit requirements of the Copyright Act.

The retrospective portion of the CTEA has a final pernicious consequence for film preservation; increasingly, it will impede the eventual physical access to movies supposedly guaranteed by the deposit requirements of Section 407 of the Copyright Act.[22] The deposit requirements are part of

[22] 17 U.S.C. § 407 (2000). The Library of Congress has an enormous collection of films assembled both from the fruits of the deposit requirement and by independent collection and bequest. Starting in 1894 the Library of Congress began collecting motion pictures, as collections of still photographs – frequently in so called "paper print" form. Initially, the Library of Congress did not retain nitrate films at all, because of the dangers posed in their storage. This practice stopped in 1942. However, subsequent acquisitions have attempted to fill in some of the gaps in the early collection and thus restore it to the condition it might have been in, had the early deposits been retained. For example, major collections include "preprint material for approximately 3,000 motion pictures from the pre- 1949 film library of Warner Bros. pictures. The collection contains 50 silent features (1913-30); 750 sound features (1927- 48); 1800 sound short subjects(1926-48); and 400 cartoons, among them "Looney Tunes" and "Merrie Melodies." The collection also contains "nearly 200 sound features released by Monogram Pictures Corporation and a number of "Popeye" cartoons released by Fleischer Studios [and] . . . an enormous collection of nitrate negatives and masters. . . as well as "70 well known Warner Bros. features (among the most popular of all American films), including "The Jazz Singer" (1927); "Little Caesar" (1930); and "Knute Rockne, All

the copyright bargain. They operate to guarantee, among other things, that there is a copy of the work available to the public, so that at the end of the copyright term the copyright holder is not in sole possession of the *res*, able to have both a lengthy legal monopoly and then also to exploit the position of market advantage conveyed by exclusive physical control.

The volatile cellulose nitrate base used on most pre-1950 films is prone to shrinkage, to outgassing that destroys the film's emulsion and even to spontaneous combustion. We are already at or beyond the normal life of many of the films that have been deposited with the Library of Congress. It has been estimated that over 50% of the movies made before 1950 have already been lost. *Librarian of Congress Report*, *supra*, at 3. The CTEA's extension of copyright for another twenty years is likely to mean that many of the deposit copies simply turn to powder.[23] In some cases, these deposit copies will be the only remaining copies of the film.[24] In other cases, they will be the only publicly available copy; by encouraging Congress to extend the term until the deposit copies literally decompose, the copyright owners have effectively managed to ensure that they can either avoid the

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American" (1940)." As the Library notes in its description of the Warner Brothers collection, "[c]opyrights are still in effect for most of the films . . . in this collection." Motion Pictures in the Library of Congress "excerpted from Footage 89: North American Film and Video Sources, New York: Prelinger Associates, 1989" at http://lcweb.loc.gov/rr/mopic/mpcoll.html (last visited May 15, 2002).

[23] Unless the Library of Congress exercises its rights under Section 108 of the Copyright Act, and engages in the expensive process of restoring – while being unable to distribute -- its entire collection from those years. *See* 17 U.S.C. § 108 (2000).

[24] The Library of Congress Report noted the case of independent film maker Victor Nunez. Nunez was left without a copy of one film after his distributor went out of business, and believes that the copy deposited for copyright protection may be the only remaining one. *Librarian of Congress Report*, *supra*, at 20.

consequences of the deposit requirement, or dramatically increase the cost to the public of maintaining a deposit copy.

5. The Congressional findings cannot sustain the legislation.

Amici have shown that the CTEA actively hurts the cause of film preservation and restoration for the majority of American films. In a record devoid of details, Congress "found" otherwise. S. Rep. No. 104-315, at 13 (1996). But, even where Congress develops a more substantial record, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of . . . legislation" when the rationale underlying the findings does not support Congressional power. *United States v. Morrison*, 529 U.S. 598, 614 (2000). As this Court pointed out in *Lopez*, "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez*, 514 U.S. at 557 (quoting *Hodel v. Va. Surface Min. and Reclamation*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment)). Rather, the scope of Congress's constitutional power "is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." *Morrison*, 529 U.S. at 614 (citations omitted). What is true for asserted effects on interstate commerce, is also true for asserted effects on the progress of science through film preservation.

The retrospective portion of the CTEA is already far outside the normal boundaries of the power conferred by the Copyright Clause, involving as it does not a single incentive to create new and original works. It would be perverse for the CTEA's extension of the copyright term on all works in any medium to be justified by its role in encouraging preservation of a few works in one medium. When, even within that medium, it can be demonstrated that the CTEA's effect on the majority of works from the relevant period is actively and undeniably to impede restoration and preserva-

tion, no "finding" of Congress to the contrary could possibly be sufficient to make such an enactment constitutional.

II. The retrospective portion of the CTEA violates the First Amendment.[25]

Congress passed a statute that has in it a provision with the following effect: an entire generation of American culture that, starting in 1998, would have become available year by year, is instead to be controlled under the terms of a statutory scheme for an additional twenty years. These works would have been free for all to use, reproduce, modify, transform, publish, display and perform. Now those who wish to adapt these plays, make these films available over the Internet, sing these songs publicly, or who wish to make new works based on those of prior generation, must ask permission of a private party. If they proceed without authorization they are subject to serious criminal and civil penalties. This portion of the statute has no possibility of encouraging new works. In fact, it applies only to works that have already been created. Is such a provision subject to First Amendment scrutiny? How could it not be?

A. The CTEA is subject to First Amendment heightened scrutiny that its retrospective portion is incapable of meeting.

The CTEA is a content neutral statute that restricts expressive activity. Such a statute may only be upheld "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged

[25] Amici believe that the prospective portion of the CTEA likewise cannot pass First Amendment scrutiny but, as in the prior Section, concentrate on the retrospective action of the statute.

First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Dealing recently with another statutory scheme which has as its ostensible goal the improvement of the information environment, the Court ruled that Congress must show that the statute serves an important government interest in a manner no more restrictive than necessary. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 662, 662 (1994). The Second Circuit has applied the *Turner* standard to Section 1201 of the Copyright Act. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001). Thus, *Turner*-level scrutiny would seem to be the appropriate standard of review here. It is a standard that amici believe this statute cannot meet.

1. The important government interest used to justify the CTEA's retrospective extension must both be within the scope of the Copyright Clause and be furthered by the extension of subsisting copyrights. The only "interest" which has any potential to meet both of these criteria is the film preservation rationale.

Obviously, the constitutionally cognizable "important government interests" that are served by the provisions at issue are limited by the constitutional clause from which the Congress drew its power. Congress may not engage in a constitutional two-step, claiming one set of legislative goals in order to show that the legislation falls within the bounds of the power-conferring clause and then offering a second and different set of "important government interests" in order to allow the statute to pass First Amendment scrutiny. Therefore, in applying First Amendment scrutiny to the CTEA, it is only those goals that are within Congress's power under the Copyright Clause that may be considered as potential "important government interests." As was pointed out earlier, neither "harmonization" nor the need to encour-

age authors by giving greater monopoly rents to their impecunious grandchildren can qualify. When looked at through the filter of the Copyright Clause these are dubious bases even for the prospective extension of copyright. Clearly neither can provide a cognizable reason *under the Copyright Clause* for the *retrospective* extension of existing copyrights.

The only "important government interests" that may be considered in assessing whether the retrospective extension of copyright passes First Amendment scrutiny are those which are a) arguably within the bounds of the Copyright Clause's "promote the Progress" language and b) arguably furthered by extension of subsisting copyrights. In reality, this is a set with a single member. the film preservation rationale.

2. Retrospective term extension of all copyrights is more restrictive than necessary to secure the asserted goal of film preservation.

Assuming *arguendo* that the film preservation rationale is within the bounds of the Copyright Clause, may the CTEA's restriction over all original works in all media be justified by an empirically dubious claim that it will give a tiny number of private parties the incentives necessary to restore a tiny number of works in one particular medium? Under the *Turner* or *O'Brien* tests only one answer is possible. On its face, the retrospective portion of the CTEA clearly does not serve an important government interest in a manner *no more restrictive than necessary*. In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court ruled that narrow tailoring of content neutral statutes restricting speech requires that the means chosen not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. By contrast, the CTEA's provisions sweep with incomparable breadth, extending the copyrights of all original works in all media for

twenty years, when the only potential constitutionally cognizable interest is at best limited to a single subset of a single medium. It is hard to think of a better example of burdening more speech than necessary.[26] This Court could find now that it is unconstitutional for that reason, or could remand to the lower court for review under heightened scrutiny.

Copyright is sometimes said to be the "engine of free expression." *Harper & Row v. Nation Enter.*, 471 U.S. 539, 558 (1985). This has led some to the mistaken conclusion that it is somehow partially immune from First Amendment scrutiny. Yet all would concede that even where the "engine of free expression" is operating, copyright still has a number of limitations imposed by the First Amendment – the idea-expression distinction, the limitations on exclusive rights that come from fair use and so on. What then of the case when the engine has already run, has already produced the original expression it is designed to produce? What of the case when we know that the extent of the legal monopoly was sufficient to encourage creation of the expressive work, know it for a certainty because the work has already been created? What of the situation where after the work has been created, after the creators have had the full extent of their lengthy legal monopoly, the Congress then seeks for an additional period of twenty years to deny citizens the ability to copy onto new media, to transform, to restore, to create derivative works or place them on the Internet? In that case we have naked government action which actually criminalizes expressive behavior and does so entirely

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[26] Congress has a large number of alternative methods of accomplishing this goal, ranging from extensions of existing film preservation statutes such as the National Film Preservation Act of 1996, 2 U.S.C. § 179l (1996) (continuing the National Film Registry, where the Library of Congress designates 25 movies a year as valuable for U.S. cultural heritage) and the National Film Preservation Foundation, (*see* 36 U.S.C. §§ 151701 *et seq.* (1998)) to direct government subsidy for preservation or digitization.

without the protective coloration of the legitimate goal of copyright law: to encourage new expression. If there *were* some constitutional doctrine granting partial First Amendment immunity for copyright law, which amici do not concede, it could exist only so long as the reason for the rule was present. *Cessante ratione, cessat ipsa lex*. With the end of any possible incentive for new creation, any "immunity" from the First Amendment would logically vanish.

The CTEA is not a statute which imposes some incidental restrictions on expression as part of a larger regime of conduct regulation. For example, the documentary filmmaker who wishes to produce DVD's of classic movies with an historical introduction and a critical interpretation at the end, or the studio that specializes in mining "orphan films" for stock footage used in contemporary works, must each apply for permission to the owner of the copyright, assuming that the owner of the copyright (or copyrights) can ever be identified. In the absence of such permission, to distribute, reproduce, or publicly perform copyrighted films, or to create derivative works, is potentially to commit a criminal act. The criminal prohibition applies to each of these activities, despite the fact that they lie at the heart of First Amendment protection, that the works being placed off limits require no additional incentive for their creation, and that the lengthened term will, in all probability, mean the irrevocable physical decomposition of a large fraction of the golden years of American cinema.

CONCLUSION

The CTEA's retrospective extension of existing copyrights exceeds the Copyright Clause's grant of power. While the Congress offered a number of legislative goals for the CTEA, the only one that both has an arguable connection to the Copyright power and that purportedly justifies retrospective term extension is the film preservation rationale. It may be for that reason that the Court of Appeals mentioned

preservation and digitization specifically. *Eldred v. Reno*, 239 F.3d 372 at 378-79 (D.C. Cir. 2001). Yet the CTEA cannot be justified in this way. Encouraging restoration turns out to be a thinly disguised "sweat of the brow" protection outside Congress's power. The scope of the extension is also fatal to the rationale. The extension of all copyrights in all media cannot be justified by the need to motivate restoration of a few works in one medium. Above all, the CTEA plainly does not accomplish the goal of encouraging preservation and digitization of American film; in fact, it substantially impedes it.

As to the majority of American films, the "orphan works" for which the "the urgency may be greatest." *Librarian of Congress Report*, *supra*, at 5, the CTEA's undeniable effect is to frustrate preservation attempts. It leaves the majority of films caught in a tangle of rights which term expiration would have cleared. By the time the lengthened term expires it may well be too late. The CTEA also keeps the public from making effective use of the vast holdings of films in the nation's archives, some of them already restored with public funds. It restricts both the restorer and the entrepreneur, the digitizer and the fan. It prevents them from copying, displaying, making derivative works and popularizing anew. Copyright seeks to promote public access; the CTEA forecloses it. Again, by the time the new term expires it may be too late. Even as to the minority of films for which it might be thought to work, namely commercial works under active copyright management, the CTEA turns out to complicate rather than to encourage the process of restoration. For all these reasons, the retrospective portion of the CTEA is outside Congress's Copyright Clause power.

The retrospective portion of the CTEA also violates the First Amendment. It is true that in many cases the courts need never reach the First Amendment in deciding a copyright issue. Yet the First Amendment status of legislation is not inherited by placement; it does not automatically apply

to any provision placed in Title 17 of the U.S. Code. It lives or dies with the reasons that gave it birth. Congress might be able to set up a regime of censorship during wartime. It could not, without First Amendment review, extend that regime for twenty years after the war, no matter how unquestionably constitutional the original scheme had been. Similarly Congress may not substantially extend copyrights over existing works without First Amendment review. Such a review has a double filter. It looks within the statutory purposes for an "important government interest" that is both cognizable under the Copyright Clause *and* that requires the extension of subsisting copyrights. Only the preservation rationale has any potential for satisfying both of these requirements (though as amici have shown, retrospective term extension will actually hurt the cause of preservation for the majority of American films.) Next the review must look to see if these important government interests are accomplished in a way that is no more restrictive of expression than necessary. But the CTEA restricts expressive activity across the entire corpus of American culture for twenty years in the name of a dubious claim to save a minority of the works within a particular medium. This is neither within Congress's powers under the Copyright Clause, nor capable of surviving First Amendment review.

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

No. 01-618

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* INTEL CORPORATION IN PARTIAL SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Intel Corporation ("Intel") submits this brief *amicus curiae* in partial support of Petitioners pursuant to Rule 37 of the Rules of this Court.[1] Founded in 1968, Intel introduced the world's first microprocessor. Intel develops technology and supplies the computing and communications industries with

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief. Letters of Consent have been filed with the Clerk of the Court.

the digital building blocks to create computers, servers, networking, and communications products. Intel is the world's largest semiconductor company and a major global Internet technology provider. As a technology company, Intel has a significant interest in strong intellectual property protection and respects and benefits from intellectual property rights and laws. At the same time, as a company participating in the effort to improve computing, networking, and communication, and to promote discourse, learning, and progress, Intel recognizes the importance of a constantly-enriched and refreshed public domain—an essential element of the progress that the framers of the Constitution sought to stimulate.

As a leading technology provider to the "Information Revolution," Intel is in a unique position to provide insight on the value of a vibrant and healthy public domain, which was plainly intended by the Constitution and is more important today than ever. Intel submits that for the first time in history the rich promise of the public domain is within the grasp of entire generations of new creators, due to the liberating power that digital computing, networking, and communications technologies deliver to the average citizen.

SUMMARY OF ARGUMENT

Intel offers no view on the appropriateness of the specific copyright term extension that is the subject of Petitioner's complaint, but believes that it would be important for this Court to provide guidance on the extent to which Congress may extend copyright protection through incremental extensions of the copyright term. The Copyright Clause of the Constitution strikes a careful balance between creating incentives and rewards for copyright owners and providing benefits to the public, and, as a creator, owner,[2] and user of

[2] As an owner of copyrights, Intel obviously benefits from copyright term extensions. However, as explained in Section III, Intel has a broader interest in this issue.

copyrighted works and other intellectual property, Intel respects and relies on this balance. Intel understands, however, that repeated extensions of the copyright term—even if each such extension is itself only incremental and limited in time—can eventually undermine the delicate balance contemplated by the framers. As a participant in efforts to promote the progress of science, innovation, and creativity, Intel has the opportunity to observe the importance of a robust and constantly-refreshed public domain.

The availability of rich new public domain content inspires new creation, innovation, and progress. At no time in history has the promise of the public domain been more tangible than today, made possible through digital technologies available to all. The capacity and accessibility of connected computing and networking technologies, the creative tools made possible by digital computing, and the eventual software contributions to an already engaged open source community,[3] give unprecedented new meaning to the phrase "public domain." While it is inherently difficult to determine where to draw the line, Intel urges the Court to evaluate incremental copyright term extensions with an understanding that digital computing, networking, and communications technologies have created an historic opportunity to give the phrase "public domain" new meaning.

ARGUMENT

Since 1962, Congress has extended the term of copyright protection eleven times.[4] The Sonny Bono Copyright Term

[3] The "open source" movement created the Linux operating system and a host of related open source software tools and applications through a "community effort" that makes software code publicly available and freely accessible.

[4] *See* 17 U.S.C. § 304 (2001). *See also* Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No.

Extension Act of 1998 (the "CTEA"), which added twenty years to the term of protection, is the most recent extension.[5] The copyright term now has increased from a maximum possible term of 28 years under the first copyright law in the United States to a term of 95 years or more, depending on the life span of the author.[6] Intel recognizes that (i) the Constitution gives Congress discretion in determining the length of the copyright protection term, (ii) U.S. artists and companies have legitimate economic interests in protecting and preserving their intellectual property, and (iii) the nature of the global economy supports a degree of uniformity between U.S. copyright terms and those of their foreign counterparts. In this context, Intel offers no opinion on the validity of the CTEA itself. Nevertheless, Congress's discretion *is* limited by the Copyright Clause of the Constitution to preserve the careful balance envisioned and established by the framers. Each time that Congress extends a copyright term, it has a direct and immediate impact on both the amount of new material entering the public domain and the age and relevance of new public domain material. Each term extension thus diminishes the value of the public domain.

91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, Title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 94-553, 90 Stat. 2753 (1976); Pub. L. No. 102-307, Title I, § 102(a), (d), 106 Stat. 264, 266; (1992); Pub. L. No. 105-80, § 12(a)(9), 11 Stat. 1535 (1997); Pub. L. No. 105-298, Title I, § 102(d)(1), 103, 112 Stat. 2827, 2829 (1998).

[5] 17 U.S.C. § 304; Pub. L. No. 105-298, Title I, § 102(d)(1) 103, 112 Stat. 2829, 2827 (1998).

[6] Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790).

I. THE POWER OF CONGRESS TO EXTEND THE TERM OF COPYRIGHT INDEFINITELY IS LIMITED BY THE COPYRIGHT CLAUSE.

Analysis of the extent and nature of Congress's power to enact copyright legislation must begin with the relevant constitutional language. Under Article I, Section 8, clause 8 of the Constitution (the "Copyright Clause"), "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This Court has recognized that the Copyright Clause grants Congress power to grant copyright protection and also sets a substantive limit on that congressional power.[7]

While no definitive term of protection is established in the Copyright Clause, its "limited Times" language denies Congress unfettered discretion when setting copyright terms. This Court would not permit Congress to establish or extend the copyright term indefinitely, or presumably even for a thousand years, through a single legislative act.[8] Nevertheless, the lower courts have concluded that Congress can incrementally extend the copyright term virtually forever as long as each extension is of finite duration, thereby permitting Congress to accomplish indirectly that which it could not accomplish directly.[9] The notion that a *de facto* perpetual

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[7] *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) ("The clause is both a grant of power and a limitation.").

[8] M. Nimmer and D. Nimmer, NIMMER ON COPYRIGHT, § 1. 05[A][1] (2001).

[9] The district court below concluded that Congress can extend the term of copyright protection without limit, provided that it does so on an incremental basis. *Eldred v. Reno*, 74 F. Supp. 2d 1, 3 n.7 (D.D.C. 1999), *aff'd* 239 F.3d 372 (D.C. Cir. 2001) ("Within the discretion of Congress, any fixed term is a limited time because it is not perpetual. If a limited time is extended for a limited time then it remains a limited time.").

copyright term is sanctioned by the Constitution as long as each individual extension is of limited duration seems inherently flawed and unable to withstand scrutiny in light of the balanced need for a rich and vibrant public domain and the plain language of the Copyright Clause itself. The public's growing demand for public domain content, made possible by digital technologies, underscores the need for this balance.

II. THE COPYRIGHT CLAUSE ESTABLISHES A BALANCE BETWEEN INCENTIVES FOR CREATORS AND PUBLIC ACCESS TO THE FRUITS OF CREATION.

The careful language of the Copyright Clause balances the rights of creators and copyright owners against the public benefits provided by unrestricted access to creative works. By providing the incentives of control and the opportunity to profit, copyright protection motivates authors and artists to create original works, which benefit both the creator and society at large.[10] At the same time, the framers recognized the long-term public benefit of eventual unrestricted public access to these creative works. As this Court has long recognized, the framers ensured that the benefits of creativity and innovation would, in due course, become freely available to the general public by way of a constantly refreshed public domain.[11]

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[10] *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("[T]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

[11] *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expressions for the good of the public."); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991)

The framers recognized that a public domain with an ever-refreshed wealth of creative works is essential to promote the progress of science.[12] Public domain material often serves as the spark for and the foundation of new creative works and efforts, as others borrow, expand, and build upon public domain materials to give the original expression of others new life. Many of the most popular movies, literary works, and theatrical works draw from original expression that is in the public domain. Digital technologies make locating, expanding, and building on the creative works of those who went before easier and more promising than ever. The public domain also increases the likelihood of the preservation of materials that otherwise would be lost or forgotten by private owners after exploitation ceases to be sufficiently profitable. This is particularly true today, where digital computing,

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("The primary objective of copyright is not to reward the labor of authors but to 'promote the Progress of Science and useful Arts.'"); *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984) ("Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright term required by the Constitution, reflects a balance of competing claims upon the public interest: creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts."); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration."); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

[12] Contrary to today's meanings, in the vernacular of the framers, the word "science" referred to the works produced by authors, while the term "useful arts" referred to the work of inventors. NIMMER, *supra* note 8, at § 1.03[A] n.1.

networking, and communications technologies allow each member of the public to become a custodian of information in the public domain, thereby increasing the likelihood that the information will not only be preserved, but also shared and built upon. The framers embraced the principle, long recognized by scholars and innovators, that in the march of human progress, the creative efforts of prior generations are a legacy to future generations. [13] The Copyright Clause establishes the public domain as the means of transmitting this important legacy, and today's digital computing, networking, and communications technologies provide historic opportunities to realize and further the framers' vision.

III. EXCESSIVE COPYRIGHT TERMS MAY SLOW THE DEVELOPMENT OF TECHNOLOGIES THAT PROVIDE ACCESS TO BOTH THE PUBLIC DOMAIN AND COPYRIGHTED WORKS.

As a major provider of the building blocks for personal computers, the Internet, and other digital technologies, Intel is dedicated to expanding legitimate and lawful access to and enjoyment of a wide range of content, including both copyrighted and public domain material. Intel manufactures the tools and the basic building blocks of the networks that (i) allow all users to access, share, and distribute public domain and other information and (ii) enable content providers to deliver and consumers to enjoy new digital goods and services. Intel also invents ways to improve the speed and

[13] "If I have seen further . . . it is by standing on the shoulders of giants." Letter from Sir Isaac Newton to Robert Hooke (February 5, 1675/1676), *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 313 (Emily Morrison Beck ed., Little, Brown & Co. 1980) (1855). *See also* Zechariah Chafee, *Reflections on Copyright Law*, 45 COLUM. L. REV. 503, 511 (1945).

reliability of connections and expand the reach of the network. Working with content creators, consumers, and service providers, Intel focuses on the build-out [14] of increasingly sophisticated networks to make universal and economical delivery of and access to all forms of content possible.

There is, however, a symbiotic relationship between the development and deployment of digital computing, networking, and communications technologies and the wealth and robustness of the content that people are able to access, communicate, and use. Consumers rely on the digital technologies created by Intel and other companies to gain access to and use content in new and compelling ways. At the same time, the continued viability and expansion of these technologies depend on readily available content that is of potential use and relevance to the public.

For example, digital technologies have created both tremendous opportunities and challenges with respect to the creation, delivery, and consumption of commercial entertainment content, which promise to speed the rate of innovation and network build-out. In this context, the real and substantial threat of digital piracy has led to the development and deployment of technologies that protect copyrighted works to preserve the incentive for artists to create those works. Intel decries piracy, and has worked for the past six years with content providers and other interested parties to improve and disseminate technologies that facilitate protected distribution of valuable copyrighted works while enabling new and inventive ways for consumers to lawfully enjoy and use them. Intel remains committed to this challenge and the development of next-generation technologies that will lead to even more diverse and creative digital product offerings and even greater consumer flexibility.

[14] "Build-out" of computing networks refers to the deployment and expansion of such networks.

A healthy and vibrant public domain is also necessary to speed the rate of technological innovation and network build-out, as it provides a rich archive of materials that can be shared and distributed by all without restriction. The value of works in the public domain thus has become increasingly important to the development and deployment of creative next-generation digital technologies and tools. New technologies that can be applied to public domain content in unrestricted ways will ultimately benefit both new and existing content creators and content consumers. Development and innovation during the Information Revolution will flourish when there is reasonable access to public domain content that can be used in any and all creative ways, without restriction and without harm to the artist, author, or proprietor who is no longer living or who has already benefited from the work. In this context, the more robust the public domain, the more robust the discourse, the communication, and the interaction with creative and informational material.

In these very real ways, the growth of digital technologies and the promise of improved communications tools directly benefit from the continued vitality and growth of the public domain. If the public domain—material that is available to all on an unrestricted basis—steadily decreases in value due to the lack of new material, the need and demand for a full range of new technologies and innovation will also decline. One cannot exist without the other. From its unique vantage point, Intel has observed continued evidence of what the framers knew over 200 years ago—that the continued growth and vitality of the public domain is essential to the promotion of science, the arts, and creative effort.

IV. DIGITAL TECHNOLOGY PRESENTS AN HISTORIC OPPORTUNITY FOR THE FUTURE OF THE PUBLIC DOMAIN.

More than ever before, developing, accessing, using, and nurturing a living and vibrant public domain, one that is truly "public," has real meaning. The open source movement [15] demonstrates both the demand for and benefits of software and other information being freely available or otherwise coming into a rich public arena. Connected and distributed digital computing, networking, and communications technologies are bringing exponential storage, computing, and communications power to the public domain and its users. The rapid growth of these movements and technologies demonstrates the unprecedented demand for information and content of all kinds, and underscores the need to ensure the continual and steady flow of content into the public domain. The opportunity for a real public domain facilitated by digital technologies is of historic proportion. Indeed, there is large and growing body of creative works, whose artists have long slept and whose proprietors long ago enjoyed the fruits thereof, that are waiting for the promise of rebirth in the public domain as envisioned by the framers. The framers well understood that these creations are ultimately the foundation of future progress and belong to and benefit us all in time when they enter the public domain.

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[15] *See* note 3, *supra*.

CONCLUSION

Intel offers no opinion on whether this Court should reverse or affirm the decision of the court below, but respectfully requests that the Court provide critical and meaningful instruction to both Congress and future courts that recognizes the balance and limitations that the framers established in the Copyright Clause, and the literal and growing importance of the public domain in that balance. Such review and instruction by this Court is essential to the continued development of new computing, networking, and communications technologies, the promotion of progress and learning, and adherence to constitutional principles.

Respectfully submitted,

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ERIC ELDRED *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF GEORGE A. AKERLOF, KENNETH J. ARROW, TIMOTHY F. BRESNAHAN, JAMES M. BUCHANAN, RONALD H. COASE, LINDA R. COHEN, MILTON FRIEDMAN, JERRY R. GREEN, ROBERT W. HAHN, THOMAS W. HAZLETT, C. SCOTT HEMPHILL, ROBERT E. LITAN, ROGER G. NOLL, RICHARD SCHMALENSEE, STEVEN SHAVELL, HAL R. VARIAN, AND RICHARD J. ZECKHAUSER AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Amici are professors and scholars who teach and write on economic issues and are concerned about the role of government in promoting economic progress. They are George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser. Various amici have taught, researched, and published analyses of the economics of innovation and the effect of government policy on the incentive to create new works. A summary of the qualifications and affiliations of the individual amici is provided at the end of this brief. Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated. Amici represent neither party in this action, and offer the following views on this matter.

SUMMARY OF ARGUMENT

This brief provides an economic analysis of the main feature of the Copyright Term Extension Act of 1998 ("CTEA"), a twenty-year extension of the copyright term for existing and future works.[2] An economist's perspective may be helpful to the Court as it considers Congress's reasons for passing the CTEA, particularly with respect to the extension for existing works.

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[1] The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of this Court. This brief was not written in whole or in part by counsel for a party. Amici and their counsel were not compensated in any way; the Stanford Institute for Economic Policy Research defrayed printing costs.

[2] Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827. In addition, this brief analyzes one ancillary economic effect of the CTEA, a longer term in Europe for U.S. copyright holders under Europe's "rule of the shorter term."

One possibility is that Congress sought a policy that confers a net economic benefit, after subtracting the expected costs. The main economic benefit from copyright protection is to give an author an incentive to create new works. The size of this economic incentive depends upon the "present value" of compensation, as anticipated by the author at the time of creation.

The two components of the CTEA differ markedly in their economic effect. The longer term for *new* works provides some increase in anticipated compensation for an author. Because the additional compensation occurs many decades in the future, its present value is small, very likely an improvement of less than 1% compared to the pre-CTEA term. This compensation offers at most a very small additional incentive for an economically minded author of a new work. The term extension for *existing* works makes no significant contribution to an author's economic incentive to create, since in this case the additional compensation was granted after the relevant investment had already been made.

The CTEA has two further effects on economic efficiency. First, the CTEA extends the period during which a copyright holder determines the quantity produced of a work, and thus increases the inefficiency from above-cost pricing by lengthening its duration. With respect to the term extension for new works, the present value of the additional cost is small, just as the present value of incremental benefits is small. By contrast, the cost of term extension in existing works is much larger in present value, especially for works whose copyrights would soon or already have expired but for the CTEA.

Second, the CTEA extends the period during which a copyright holder determines the production of derivative works, which affects the creation of new works that are built in part out of materials from existing works. Where building-block materials are copyrighted, new creators must pay to use those materials, and may incur additional costs in locating and negotiating with copyright holders. Such transaction costs are

especially large where the copyright holders whose permissions are required are numerous or difficult to locate. By reducing the set of building-block materials freely available for new works, the CTEA raises the cost of producing new works and reduces the number created.

Taken as a whole, it is highly unlikely that the economic benefits from copyright extension under the CTEA outweigh the additional costs. Moreover, in the case of term extension for existing works, the sizable increase in cost is not balanced to any significant degree by an improvement in incentives for creating new works. Considering the criterion of consumer welfare instead of efficiency leads to the same conclusion, with the alteration that the CTEA's large transfer of resources from consumers to copyright holders is an additional factor that reduces consumer welfare.

ARGUMENT

I. IT IS HIGHLY UNLIKELY THAT THE ECONOMIC BENEFITS FROM COPYRIGHT EXTENSION UNDER THE CTEA OUTWEIGH THE COSTS

A. The CTEA Provides At Most A Very Small Benefit To Innovation

1. Copyright solves a special problem in the technology of production of creative works

To the extent that a concern for economic values motivates copyright policy, it is important to understand its main benefits and costs. In basic terms, copyright protection grants a monopoly over the distribution and sale of a work and certain new works based upon it. The copyright monopoly has several costs, which are described at pages 10-12 and 12-15 below. In addition, copyright protection provides a benefit to society by providing incentives for the production of new creative works.

The main economic rationale for copyright is to supply a sufficient incentive for creation.[3] To produce a new book, film, or other creative work, an author must make a substantial up-front investment.[4] For the resulting work to be profitable overall, the author must recoup her initial investment through sales of the work to consumers. An economically minded author will recognize this and invest in creation only if the expected returns, after paying per-unit (or "marginal") costs, are larger than the up-front investment; otherwise the author would lose money overall.

The recovery of up-front costs is a general concern for many producers, but authors face a special kind of economic problem, due to the technology of production for creative works. To understand this, consider the position of a second competitor, who wishes to make the same product as the first entrant into a market. For products generally, the second competitor must incur the same kinds of costs as the original entrant in order to participate in the market. Books, films, and other creative works are different: without legal protection, an author cannot prevent others from appropriating the fruits of the initial investment. Here, a second competitor can quickly enter the market by simply copying the work and offering it for sale, without incurring similar development costs. Without the ability to exclude, entry may be easy and quick, the resulting fall in prices to marginal cost can be rapid, and non-recovery of initial investment by the author is very likely. In this

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[3] For two classic accounts, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright*, 18 J. LEGAL STUD. 325 (1989); Stephen G. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

[4] The incentives of copyright affect publishers as well as authors, but the same arguments apply to the initial publisher as to the author.

environment, an author has less of an incentive to produce new works.[5]

In economic terms, then, copyright provides incentives for creation by solving the special problem of non-excludability of creative works, assuring authors an opportunity to recoup their initial investment in creation. The economic value of a change in copyright policy depends upon the extent to which it increases incentives for creation. The CTEA lengthens the copyright term by twenty years, for both new works and existing works. As the economic value differs for the two kinds of extension, each case is considered in turn.

2. The CTEA's longer copyright for new works provides at most a very small additional incentive

The CTEA lengthens the copyright term for new works from life-plus-fifty years to life-plus-seventy years for individual authors, and from seventy-five years to ninety-five years for works for hire. Thus, the additional compensation from term extension accrues over a number of years. To evaluate and compare the magnitude of cash flows that occur in the future, economists use concepts of "present value" and "future value."

For a given amount of money today, future value is the amount that money would be worth at some point in the future. For example, if the interest rate is 7%, $1 today has a future value of $1.07 a year from now. Present value is the reciprocal of future value; thus $1.07 next year has a present value of $1 today. One dollar, received a year from now, has a present value of approximately $0.93 ($1/1.07). Similarly, $1.14 two years from now has a present value of $1, and $1 in two years

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[5] See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF ECONOMIC ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609 (National Bureau of Econ. Research ed., 1962).

is equivalent to approximately $0.87 today. The further away in time it is paid, the less that payment is worth in present value.[6]

The twenty years of copyright term added by the CTEA provide a flow of additional benefits that is very far into the future, and hence very small in present value. To illustrate, suppose that an author writes a book and lives for thirty more years. In this case, under the pre-CTEA copyright regime, the author or his assignee would receive royalties for eighty years. If the interest rate is 7%, each dollar of royalties from year eighty has a present value of $0.0045. Under the CTEA, this same author will receive royalties for one hundred years. Each dollar of royalties from year one hundred has a present value of $0.0012.

In this example, the present value of total additional revenues under the CTEA can be calculated by adding up the present values of revenues from year eighty-one through year one hundred. Suppose that the work produces a constant stream of revenues, and assume once again that the interest rate is 7%. In this case, the present value of the total return from years eighty-one to one hundred is 0.33% of the present value from years one to eighty.[7] Put differently, under these assumptions, the additional compensation provided by the CTEA amounts to a 0.33% increase in present-value payments to the author, compared to compensation without the twenty-year term extension.[8]

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[6] In general, given an interest rate of r, $1 today grows to $(1+r)^n$ in n years. So $1, n years in the future, has a present value of $1/(1+r)^n$ today.

[7] The present value of $1 each year for eighty years is $14.22 (at a 7% interest rate). The present value of $1 each year from years eighty-one to one hundred is $0.047, which is 0.33% of $14.22.

[8] Analogously, the present value of additional compensation for a new work for hire is 0.47%.

The conclusion above is based on two assumptions: a constant stream of revenues and a 7% interest rate.[9] The assumption of a constant revenue stream for one hundred years is very conservative, that is, it tends to overstate the amount of compensation, because most works lose economic value over time. As evidence, only a small percentage of copyright registrants bother to renew their works, although renewal costs only a few dollars,[10] and only a fraction of renewed copyrights continue to be valuable to copyright holders.[11] If depreciation of value is taken into account, the additional compensation provided by the CTEA is likely to be much less than 0.33%.

The second assumption is the choice of an interest rate. In general, much as investors require higher compensation for riskier investments, a higher interest rate is appropriate for the purpose of evaluating highly uncertain revenue streams. Seven percent is meant to be illustrative, but it is a realistic estimate, perhaps even conservative, given the high degree of uncertainty about the revenues resulting from the production of a creative work. Appendix B reports the present value of additional compensation at different rates; the magnitude remains very small over a range of plausible rates.

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[9] Here, 7% is a real interest rate, defined as the rate of return on capital, net of inflation.

[10] A study of renewals prior to the 1976 Act found a renewal rate of less than 15%. Barbara A. Ringer, *Renewal of Copyright*, *in* STUDIES ON COPYRIGHT 503, 616-20 (Arthur Fisher Memorial ed. 1963).

[11] A pre-CTEA Congressional Research Service study examined a sample of renewed copyrights, finding that 11% of copyrights in books, 12% in musical works, and 26% in motion pictures had some commercial value in 1998. Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, Congressional Research Service Report 98-144E (1998).

3. The CTEA's extension of copyright in existing works provides no significant incentive to create new works

The analysis so far has suggested that, under a range of plausible assumptions, the CTEA's term extension for new works provides only a very small economic incentive to create new works, namely much less than one percent. The CTEA's extension of copyright in existing works by twenty years provides essentially no incentive to create new works. By the time of the CTEA's passage, pre-CTEA authors had already made initial investments in creation. Once a work is created, additional compensation to the producer is simply a windfall.

The CTEA's extension for existing works could in theory have an effect on creators of new works, by creating an expectation that, in the future, Congress would extend copyright even more, and that this extension would apply retroactively to existing works. The maximum impact on incentives from this effect, however, is trivial because the current copyright term already has nearly the same present value as an infinite copyright term. Granting a perpetual copyright would increase compensation by at most 0.12% (at a 7% interest rate),[12] or less once declining revenues are taken into account. The actual effect on incentives would be even smaller, if further extensions are not a certainty.[13]

One might argue that the windfall to authors of existing copyrights has a positive consequence, by providing them with

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[12] At a 7% interest rate, the present value of $1 annually for one hundred years is $14.27, and the present value of $1 annually in perpetuity is $14.29, an increase of 0.12%. For a fuller discussion, see Linda R. Cohen & Roger G. Noll, *Intellectual Property, Antitrust and the New Economy*, 62 U. PITT. L. REV. 453, 471 (2001).

[13] Indeed, if the extension for existing works creates an expectation that the future term could be adjusted downward as well as upward, this could have a negative effect on incentives.

more resources for additional creative projects. However, this argument ignores the profit maximization decision of a producer, which takes into account the producer's cost of capital for a given investment. In general, a profit-maximizing producer should fund the set of projects that have an expected return equal to or greater than their cost of capital. If a producer lacks the cash on hand to fund a profitable project, the producer can secure additional funding from financial institutions or investors. If the producer has resources remaining, after funding all the projects whose expected returns are higher than the cost of capital, this remainder should be invested elsewhere, not in sub-par projects that happen to be available to the firm. If a producer pursues the same set of projects in any event, then its incentives will not be improved from the mere fact of a windfall from consumers.[14]

Aside from its effect on the creation of new works, it is also possible as a logical matter that a term extension could affect a copyright holder's incentive to make investments in existing works. Such cases would occur in at most a small subset of copyrights, since extension has an incremental effect only after many years of copyright, and (as suggested above) most works lose their economic value to the initial copyright owner after a very few years. The same will tend to be true of improvements. For those remaining works where post-creation investments might be thought a significant factor, a twenty-year copyright extension will tend to have little or no incremental effect. For investments such as branding, other legal instruments such as trademark and rights of publicity already protect the investment. For other improvements, such as translations, a separate

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[14] The analysis in the text applies to media companies and other producers with substantial resources or access to U.S. capital markets. For a starving artist who lacked resources or access, more resources might permit the artist to fund a larger set of projects. But, for an extension in existing term to help with this, the artist would have to already own an existing copyright about to expire under the pre-CTEA term, which is unlikely.

copyright in the improvement is available. Overall, a twenty-year extension seems unlikely to have a significant effect on post-creation incentives.

B. The CTEA Increases The Social Cost Of Monopoly

A full economic analysis of the CTEA's incremental effects requires an evaluation of its benefits and costs, compared to the effects of the pre-CTEA term. As discussed above, the benefits, in the form of additional incentives to create new works, are at most very small in the case of extended copyright for new works, and insignificant with respect to existing works. For the CTEA to make economic sense as an efficiency-enhancing measure, the costs should be similarly small. The remainder of the brief considers two sources of cost that are affected by the CTEA: misallocations due to inefficient pricing and the effective tax that copyright extension imposes upon the creation of new works.

The economic story of inefficient pricing under monopoly is a familiar one. In a competitive market, sellers undercut one another, with the consequence that price tends to fall to marginal cost. A price equal to marginal cost ensures an efficient allocation of resources, since all consumers who value the good at more than its marginal cost will purchase the good at that price. By contrast, a monopolist can set price above marginal cost for a sustained period of time. At this higher price, some consumers will be unwilling to purchase the good, although they would have purchased it at a price equal to marginal cost.

These missed opportunities for selling give rise to an inefficient allocation, since some consumers value the good more than its marginal cost of production, but less than the higher price charged by the monopolist. The consequences for allocation are important in the case of creative works because marginal costs are very low. Production and distribution of an additional unit are relatively cheap, once the work is created. If copyright gives a producer substantial market power, the

price may be well above marginal cost, in which case a large number of consumers may be excluded.

Since the CTEA lengthens the term of copyright by twenty years, it permits above-cost pricing for a longer period of time, and thus it imposes an incremental burden on society. But it is important to note when these higher costs are incurred. As discussed in the previous section, the increase in incentives to create is very small in present-value terms, because it is so far in the future. By contrast, the additional burden of the CTEA is composed of the effect from extension in existing works, as well as an effect in the future from works not yet created.

The extension for existing works accounts for the bulk of the economic cost. (For works not yet created, the additional cost of term extension is small in present value, just as the additional compensation for creating new works is small in present value.) Again, a present-value analysis helps to underscore this point. The closer to copyright expiration a work was under the pre-CTEA regime, the larger the present value of the additional cost imposed by the CTEA. For works whose copyrights were near expiration when the CTEA was passed, this effect is especially large: a deadweight loss experienced today is 224 times as large in present value as a deadweight loss eighty years from now (at a 7% interest rate).

Given the economic benefits and costs described so far, it is difficult to understand copyright term extension as an efficiency-enhancing measure. Moreover, it is especially difficult to understand the CTEA's extension for existing works by reference to efficiency. For existing works, particularly those whose pre-CTEA copyrights were about to expire, the social cost of monopoly pricing is at a maximum, and here the extension provides no counter-balancing increase in the incentive to produce new works.

The analysis so far has focused upon efficiency. The CTEA can also be understood in terms of its impact upon consumer welfare. A consumer-welfare-based analysis of monop-

oly takes notice of an additional consequence of the copyright holder's monopoly, namely the substantial transfer of resources from consumers to producers that results from prolonging the period of monopoly pricing. Given the redistribution from consumers to producers, the consequences for consumer welfare are more negative than the consequences for efficiency.[15]

II. THE CTEA REDUCES INNOVATION BY RESTRICTING THE PRODUCTION OF NEW CREATIVE WORKS THAT MAKE USE OF EXISTING MATERIALS

A copyright holder has two kinds of monopoly power, each of which is a potential source of producer profit and social cost. First, as discussed above, copyright imparts control over the quantity produced of a work, permitting the holder to maintain a price higher than marginal cost. Second, copyright provides control over the production of derivative works based in part on copyrighted material. In certain circumstances described below, this control results in higher costs and lower production of new creative works.

Many new creative works are built in part out of materials from existing works. For example, new fiction re-tells old stories, new documentaries re-use historical footage, and new music re-mixes and transforms old songs. Improvements in the technology of search and recombination continue to expand the economic importance of new creation based upon old materials.

If building-block materials are copyrighted, there are two sources of inefficiency to consider. If the later innovator must

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[15] The twenty-year increase in European protection of U.S. copyrights will have an additional effect, a transfer of resources from European consumers to the owners of U.S. copyrights. This windfall to U.S. copyright holders is in addition to the transfer from U.S. consumers, and in general will not lower the profit-maximizing price charged to U.S. consumers, or lessen the inefficiency (and transfers from U.S. consumers) resulting from a producer's exercise of market power.

pay for use of the earlier work, this will raise the innovator's cost of making new works, reducing the set of new works produced. In addition, if the process of bargaining and contracting is itself costly, a copyright holder's control over derivative works imposes an additional tax on innovation.

In many cases efficient exchange is hampered by the presence of several kinds of transaction costs. First, a new creator may have difficulty locating an earlier copyright holder, particularly in the case of very old works that have been under copyright for a long time. Uncertainties about the identity of the original author or subsequent assignee of the copyright deepen the difficulty. When copyright holders are difficult to locate, it is costly to track them down, and, if it is even more difficult to locate copyright holders of older works, then transaction costs will increase disproportionately for these works.

Second, for documentaries and many other works, a new creator must negotiate with a large number of previous copyright holders, often for minimal uses of their works. When copyright holders are numerous, it is costly to negotiate and reach agreements with all of them. One result is a "tragedy of the anti-commons": when too many parties have actual or potential vetoes on the creation of an economically valuable object, that object will tend to be under-produced.[16] The resulting costs to society take two forms: the expenditure of resources to organize and complete these agreements, and a reduction in works created due to the higher costs of producing them.

As Ronald Coase and many others have pointed out,[17] economic efficiency is best promoted by legal arrangements that

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[16] See James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anti-Commons*, 43 J.L. & ECON. 1 (2000).

[17] See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

minimize transaction costs. Here, a limit on the duration of control rights over derivative works tends to reduce transaction costs. To the extent that the duration of derivative rights is expanded instead, there will tend to be an increase in wasteful expenditures to locate and bargain with copyright holders, as well as a reduction in the creation of new works based upon earlier copyrighted works. Here, the CTEA increases transaction costs by lengthening the rights over derivative works by twenty years, thus shrinking the pool of public domain materials available for recombination into new works.

This conclusion is subject to the condition that the owner of the original copyright is not somehow the most efficient creator of the subsequent work. Although sometimes applied to patent, this argument has little application to copyright. In copyright, diverse, "abundant" expression is the source of value, not successive refinements with respect to an agreed-upon metric of quality,[18] and a large number of disparate innovators may be better at producing abundance. Moreover, in the two situations described above, existing copyright holders are certainly not at an advantage. If the copyright holder is unaware of the copyright (for example, a descendant of the original author) or its value for creating derivative works, he is unlikely to explore possible derivative works in a vigorous way. And, when many existing works have to be pooled and recombined to create a new work, the owner of a single existing work is at no practical advantage in creating the new work, as she still must negotiate with all the other owners. In the case of this single owner, too, transaction costs are minimized when the later innovator has a right to use earlier materials.

In short, a lengthened copyright term under the CTEA keeps additional materials out of new creators' hands. Would-be new creators face increased transaction costs: the necessity to engage in costly locating (especially for very old works, the

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[18] See Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1123 (1986).

very ones that would be in the public domain but for the CTEA) and bargaining with multiple parties. These higher costs give new creators less incentive to produce. As a result, the CTEA imposes two kinds of burden on society, fewer new works produced and higher transaction costs in the creation of some works.

CONCLUSION

Comparing the main economic benefits and costs of the CTEA, it is difficult to understand term extension for both existing and new works as an efficiency-enhancing measure. Term extension in existing works provides no additional incentive to create new works and imposes several kinds of additional costs. Term extension for new works induces new costs and benefits that are too small in present-value terms to have much economic effect. As a policy to promote consumer welfare, the CTEA fares even worse, given the large transfer of resources from consumers to copyright holders.

Respectfully submitted.

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May 20, 2002

APPENDIX A

LIST OF SIGNATORIES TO THE BRIEF

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Nobel Memorial Prize in Economic Sciences, 2001

Kenneth J. Arrow
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Nobel Memorial Prize in Economic Sciences, 1972

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Nobel Memorial Prize in Economic Sciences, 1986

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Nobel Memorial Prize in Economic Sciences, 1976

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APPENDIX B

PRESENT VALUE OF ADDITIONAL COMPENSATION

For an individual author:*

Interest Rate	*Compensation, Years 1-80*	*Additional Compensation, Years 81-100*	*Percent Increase*
5%	$19.60	$0.25	1.28%
7%	$14.22	$0.05	0.33%
10%	$10.00	$0.00	0.04%

For a work for hire:

Interest Rate	*Compensation, Years 1-75*	*Additional Compensation, Years 76-95*	*Percent Increase*
5%	$19.48	$0.32	1.65%
7%	$14.20	$0.07	0.47%
10%	$9.99	$0.01	0.07%

* Individual author calculations assume authorship thirty years prior to death, which implies eighty years of copyright without the CTEA, one hundred years of protection with the CTEA.

Calculations assume a constant annual revenue stream. For ease of exposition, annual payments are assumed to be $1, but the percentage increases are unchanged for larger or smaller constant annual streams.

(20)

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In the
Supreme Court of the United States

ERIC ELDRED, ET. AL.,
Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTELLECTUAL PROPERTY LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

This brief *amici curiae* in support of petitioners is submitted pursuant to Rule 37 of the Rules of this Court. Counsel for petitioner and respondent have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

Amici are 53 law professors who teach and research intellectual property law at American universities; a complete list of amici is set forth in an appendix to this brief. In their capacity as educators, amici write books and articles protected by copyright. They also make extensive use both of copyright-protected works and of works in the public domain. Amici are deeply concerned with the integrity of copyright law and with the constitutional goals of promoting authorship and innovation and of encouraging the broad dissemination of works of authorship. Amici seek to ensure that Congress grants rights to copyright owners in a manner that is consistent, rather than in conflict, with those goals.

Amici are in particular concerned about the recent, rapid expansion of copyright scope and duration, at the expense of the public domain. This expansion threatens to distort the balance between incentives and public access embodied in the Copyright and Patent Clause.

INTRODUCTION

In 1888, the British author Herbert G. Wells wrote and published "The Time Traveler," a short story about a time machine. In 1895, he published *The Time Machine* as his first novel. *The Time Machine* was a critical and popular

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[1] No counsel for a party authored this brief in whole or part. The Willard Pedrick Distinguished Research Scholar Fund of the Arizona State University Foundation, at the direction of amicus Dennis S. Karjala, made a monetary contribution to defray the costs of printing the brief.

success, bringing Wells fame, and enough money to quit his job as a biology teacher and devote himself to writing full-time.[2] Wells went on to write and publish thirteen further novels and numerous short stories. He died in 1946. The copyright in *The Time Machine* was registered in the United States in 1895, and renewed in 1923. The novel entered the public domain in 1951. Since that date, it has been continuously in print. Later authors have adapted *The Time Machine* in a variety of formats, including sequels,[3] films,[4] comic books,[5] musicals,[6] a ballet,[7] and a video game.[8] Since 1992, the full text of *The Time Machine* has been available on the Internet via Project Gutenberg.[9] In Europe, *The Time Machine* is still protected by copyright. It will not enter the public domain until 2016 – 70 years following Wells's death. In Europe, these works could not have been created at all unless their authors had secured a license from Wells's estate.

Wells's 1933 novel *The Shape of Things to Come* will also enter the public domain in Europe in 2016. In the

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[2] See Michael Foot, *H.G.: The History of Mr. Wells* 29-35 (1995).

[3] See Stephen Baxter, *The Time Ships* (1995); Egon Friedell, *The Return Of The Time Machine* (1972); K.W. Jeter, *Morlock Night* (1979); David Lake, *The Man Who Loved Morlocks* (1981); George Pal & Joe Morhaim, *Time Machine II* (1981).

[4] See *The Time Machine* (2001); *Time After Time* (1979); *The Time Machine* (1978); *The Time Machine* (1960); *The Time Machine: The Journey Back* (1993).

[5] See H.G. Wells, *The Time Machine* (Classics Illustrated #133 1956); H.G. Wells, *The Time Machine* (Dell Comics 1960); Otto Binder, *The Time Machine* (Marvel Classics Comics #2 1976); Geoff Johns, *The Morlocks* (Marvel Comics 2002).

[6] See Jerry Flattum, *Time Travelers* (1980); R. Wright Campbell & Brian Bennett, *The Time Machine: a musical play in 2 acts* (1981).

[7] Christopher Stone, *The Time Machine Ballet* (1982)

[8] See *The New Adventures of The Time Machine* (Dreamcatcher Interactive, Inc. 2002).

[9] See URL: http://sailor.gutenberg.org/etext92/timem11.txt.

United States, however, the copyright in *The Shape of Things to Come*, originally scheduled to expire in 1989, was extended for an additional nineteen years by the 1976 Copyright Act, and extended again for another 20 years by the Sonny Bono Copyright Term Extension Act. The copyright in *The Shape of Things to Come* will endure in the United States until 2028 – twelve years after the novel enters the public domain in Europe. In the United States, *The Shape of Things to Come* is out of print.

BACKGROUND: THE LEGISLATIVE HISTORY OF THE COPYRIGHT TERM EXTENSION ACT

The Sonny Bono Copyright Term Extension Act [CTEA][10] added an additional 20 years to the terms of U.S. copyrights, both prospectively, for works not yet created, and retrospectively, for works already protected by copyright at the time the CTEA took effect. The sequence of events leading to the enactment of the CTEA began with the European Union's adoption of the *Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights*. The EU Directive harmonized the copyright terms of EU member states by requiring states to extend their copyright terms to match the longest terms granted by any member. United States copyright owners urged Congress to follow suit.

In the same year, the U.S. Copyright Office announced that it would hold a hearing on copyright duration. See 58 Fed. Reg. 40838 (1993). At that hearing, according to the Register of Copyrights, "[p]erhaps because legislation did not appear on the horizon, only representatives who strongly supported increasing the term of protection appeared. They represented lyricists and composers, music publishers, and the motion picture

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[10] Pub. L. No. 105-298, 112 Stat. 2827 (1998).

industry."[11] Composers, music publishers, and film studios continued to lobby strongly for copyright term extension.[12] They argued that because European nations would apply the "rule of the shorter term," works originating in the U.S. would be protected in Europe only until their U.S. copyrights expired. To take advantage of the increased copyright term in Europe and the royalty payments that increase might generate, they contended, the United States would need to increase the term of its copyrights to match Europe's.[13]

In 1995, Representative Moorhead introduced H.R. 989, the "Copyright Term Extension Act of 1995." Senator Hatch introduced a companion bill, S. 483, in the Senate. Both bills would have amended the copyright law by extending copyright terms for all works by an additional 20 years.[14] At the House and Senate hearings, witnesses testified about the benefits that would flow from harmonizing copyright duration in a global market, and the trade advantages associated with increasing the copyright term to take advantage of the lengthened E.U. term.[15] A parade of composers,[16] composers' children,[17]

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[11] See *Copyright Term Extension Act of 1995, Hearing on S. 483 Before the Senate Judiciary Committee*, 104th Cong., 1st Sess. 14 (1997) (prepared statement of MaryBeth Peters, Register of Copyrights) [hereinafter *1995 Senate Hearing*].

[12] See Seth Goldstein, *Is End Near For Films in Public Domain?*, Billboard, Jan. 15, 1994, at 6.

[13] See *1995 Senate Hearing* at 20-21(prepared statement of MaryBeth Peters, Register of Copyrights).

[14] H.R. 989, 104th Cong., 1st Sess. (1995); S. 483, 104th Cong., 1st Sess. (1995).

[15] See, e.g., *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 205 (1996) (testimony of Charlene Barshefsky, Deputy U.S.Trade Representative) [hereinafter *1995 House Hearing*]; *1995 Senate Hearing* at 23 (testimony of Bruce Lehman, Commissioner of Patents); *id.* at 137 (prepared statement of American Society of Composers, Authors and Publishers):

> Mr. Chairman, it comes down to this: we can obtain 20 years of continued trade surplus for American creativity in the European market at no cost to ourselves, simply by enacting your legislation. If we fail to act promptly, many great American creative properties will cease to generate revenues abroad for an additional 20 years.

[16] See, e.g., *1995 Senate Hearing* at 43-46 (1997) (testimony of Alan Menken); see also *id.* at 58-59 (prepared statement of Ginny Mancini, widow of composer Henry Mancini).

[17] See, e.g., *1995 House Hearing* at 268 (written testimony of Marsha Durham, daughter of composer Eddie Durham); *id.* at 272 (written testimony of Mary Ellin Barlett, daughter of composer Irving Berlin); see also *1995 Senate Hearing* at 64-65 (prepared statement of Shana Alexander, author and daughter of composer Milton Ager):

> [I]t appears to me monstrously unfair that other recognized forms of property -- lands, businesses, and so on--can be handed down indefinitely, so long as proper taxes are paid, whereas the value of intellectual property under our present copyright laws arbitrarily is cut off 75 years after it was created.

and composers' grandchildren[18] presented testimony urging Congress to enact a 20-year extension to prevent the expiration of their copyrights.[19]

As Register Peters's testimony before the Senate Judiciary Committee made clear, though, the bills would not in fact have harmonized U.S. copyright terms to

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[18] See *1995 House Hearing* at 264 (prepared statement of E. Randol Schoenberg, grandson of Arnold Schoenberg).

[19] The Senate committee reported S. 483 favorably with two amendments; neither one significantly affected the legislation's failure to harmonize copyright terms. S. Rep. No. 315, 104th Cong. 2d Sess. (1996). The bills did not reach a vote, and were reintroduced in the 105th Congress. See Copyright Term Extension Act of 1997, H.R. 604, 105th Cong., 1st Sess. (1997); Copyright Term Extension Act of 1997, S. 505, 105th Cong., 1st Sess. (1997).

Europe's.[20] Further, no witness and no member of Congress expressed concern that the extant term of copyright protection was inadequate to encourage authors to create and distribute new works of authorship. On the contrary, witnesses, Senators, and Representatives praised the unparalleled success of the U.S. copyright system, which had made the U.S. the world leader in the production and marketing of copyrighted works.[21] No witness or member of Congress suggested that circumstance or government action had prevented copyright owners from exploiting their works to the fullest extent during the copyright terms they had already enjoyed.[22] Instead, witnesses and members of Congress argued that fairness required U.S. copyrights to last for the lives of the author and two generations of descendants, as they now would in Europe.[23]

Congress passed the legislation, renamed the "Sonny Bono Copyright Term Extension Act," in October of 1998. The Act may, as its sponsors promised, "ensure that the United States will continue to receive the

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[20] *1995 Senate Hearing* at 11-22 (prepared statement of Marybeth Peters, Register of Copyrights). See also *1995 House Hearing* at 312 (1995) (testimony of Professor William Patry, Cardozo Law School). Professor Patry testified at length about H.R. 989's failure to harmonize U.S. copyright terms with the terms prescribed by the E.U. directive, and offered suggestions for amendments to solve some of the problems. Patry's suggestions received no serious consideration.

[21] See, e.g., *1995 Senate Hearing* at 1-4 (statement of Senator Hatch); *id.* at 40 (testimony of Jack Valenti, Motion Picture Association of America); *1995 House Hearing* at 1 (statement of Rep. Moorhead); *id.* at 205 (testimony of Ambassador Charlene Barshefsky, Deputy U.S. Trade Representative).

[22] Cf. Tyler Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyr. Soc'y USA 19, 107-09 (2002).

[23] See, e.g., *1995 Senate Hearing* at 1-4 (statement of Senator Hatch); *1995 House Hearing* at 268 (prepared statement of Marsha Durham, widow of Eddie Durham).

enormous export revenues that it does today from the sale of its copyrighted works abroad."[24] But it does not encourage authors to create new works of authorship, and it does not harmonize U.S. copyrights with Europe's.

Petitioners challenged the constitutionality of the CTEA under the Copyright and Patent Clause, art I, § 8, cl. 8, and the First Amendment. The Court of Appeals held that the initial language of the Copyright and Patent Clause, giving Congress "Power . . . To promote the Progress of Science and useful Arts," imposes no constraints whatsoever on Congress's authority to enact copyright laws. See *Eldred v. Reno*, 239 F.3d 372, 377-78 (D.C. Cir. 2001). It dismissed petitioners' First Amendment challenge on the ground that "copyrights are categorically immune from challenges under the First Amendment." *Id.* at 375-76.

SUMMARY OF ARGUMENT

The CTEA's extension of the terms of existing copyrights exceeds Congress's power under the Copyright and Patent Clause, for it advances no goal cognizable under that clause. The overriding goal of the CTEA was to extend the period in which copyright holders could control and collect royalties from their old copyrights; its constriction of the public domain carries with it none of the countervailing public benefits required by the Copyright and Patent Clause. In addition, both the CTEA's extension of existing copyright terms and its extension of copyright in works not yet created violate the First Amendment.

ARGUMENT

I. THE CTEA IS BEYOND CONGRESS'S POWER UNDER THE COPYRIGHT AND PATENT CLAUSE

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[24] Cong. Rec. H9950 (Oct. 7, 1998) (remarks of Rep. Coble).

A. CONGRESS HAS NO POWER TO ENACT LEGISLATION UNDER THE COPYRIGHT AND PATENT CLAUSE UNLESS THAT LEGISLATION PROMOTES "THE PROGRESS OF SCIENCE AND USEFUL ARTS," AND IT HAS NO POWER TO GRANT EXCLUSIVE RIGHTS THAT EXTEND BEYOND "LIMITED TIMES"

The Copyright Term Extension Act was enacted pursuant to Congress's power under the Copyright and Patent Clause. That clause vests Congress with power

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The Framers intended the Copyright and Patent Clause to give Congress the power to encourage the creation, broad dissemination, and widespread use of writings and inventions, by promising authors and inventors exclusive rights that would be limited in both scope and duration.[25] The promise of exclusive rights was designed to encourage authors to create and inventors to discover.[26] The restriction to limited times was designed to ensure that the public will have unrestricted access to and use of protected writings and inventions at the expiration of a short period of exclusivity.[27]

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[25] See *Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1975); *Graham v. John Deere*, 383 U.S. 1, 5-6 (1966); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Trade-Mark Cases*, 100 U.S. 82, 93-94 (1879).

[26] See *Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340 (1991); *Graham v. John Deere*, 383 U.S. 1, 9 (1966).

[27] See Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed too Long?,"* 52 Fla. L. Rev. 989 (2000); Richard Graves, *Private Rights, Public Uses and the Future of the Copyright Clause*, 80 Neb. L. Rev. 64 (2001); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119; Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 Harv. J. on Legis 45 (2000); Edward C Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. Intell. Prop. L. 315 (2000).

As the Court explained in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984):

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.[28]

The Framers' purpose in enacting the Copyright and Patent Clause is reflected in the specification of Congress's power as one "to promote the Progress of Science and useful Arts."[29] The D.C. Circuit, oddly, held that the clause's limitation of congressional power to enactments that "promote the Progress of Science and useful Arts" has no relevance to the scope of that power. *Eldred v. Reno*, 239 F.3d 372, 377-78 (D.C. Cir. 2001). That holding was fundamentally mistaken.

In *Graham v. John Deere*, 383 U.S. 1 (1966), a patent

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[28] See also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-350 (1991); *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151,156 (1975); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-8 (1932).

[29] See Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 DePaul L. Rev. 97 (1993); Malla Pollack, *What is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing The Progress Clause*, 80 Neb. L. Rev. (forthcoming 2002).

case, the Court described the bargain the Copyright and Patent Clause embodies. The Copyright and Patent Clause, the Court warned, grants only "qualified authority," because Congress's power under the clause "is limited to the promotion of advances in the 'useful arts.'" *Id.* at 5. In exercising the art. 1, sec. 8, cl. 8 power, Congress "may not overreach the restraints imposed by the stated constitutional purpose." *Id.* at 6. Because the patent system "by constitutional command must 'promote the Progress of . . . useful Arts,'" Congress may not "enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby." *Id.* It may not "authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Id.* It may enact no rule conferring a patent monopoly unless the rule advances "[i]nnovation, advancement, and things which add to the sum of useful knowledge." This, the Court explained, "is the *standard* expressed in the Constitution and it may not be ignored." *Id.* (emphasis in original).

Even without regard to *Graham v. John Deere*, the D.C. Circuit's position is contrary to the constitutional language. It is well-settled that the constitutional language conferring a power on Congress constrains the scope of that power. That, after all, is the very purpose of the constitutional text. The "powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *United States v. Morrison*, 529 U.S. 598, 607-08 (2000) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)); see also, e.g., *Railway Labor Executives' Assn v. Gibbons*, 455 U.S. 457, 468, 471 (1982) (finding in the "language of the Bankruptcy Clause itself" an "affirmative limitation or

restriction upon Congress' power").[30] In this case, the text of Art. I, sec. 8, cl. 8 empowers Congress to enact statutes that "promote the Progress of Science and useful Arts," much as other clauses of Art. 1, sec. 8 empower Congress to enact statutes that "regulate Commerce . . . among the several States," or that "establish Post Offices and Post Roads." The authority to enact statutes that "promote the Progress of Science and useful Arts" is the *power* the constitutional text confers. If a statute does not "promote the Progress of Science and useful Arts," it is outside the scope of the constitutional grant.[31]

The Copyright and Patent Clause's second phrase, restricting authors' and inventors' exclusive rights to "limited Times," is just as crucial to the constitutional bargain. The "limited times" restriction encourages early and broad distribution of protected writings and inventions, both by inducing authors and inventors to exploit their monopoly rights fully during their short term rather than hoard them, and by ensuring that after a brief period of exclusivity, the public will be able to use, consume, distribute, improve and build on those writings and inventions without limitation. See, e.g., *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990). Authors and inventors

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[30] Similarly, the Court has made clear that "limitations on the commerce power are inherent in the very *language* of the Commerce Clause." *United States v. Lopez*, 514 U.S. 549, 553 (1995)(emphasis added); see also *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (Spending Cause); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (Fourteenth Amendment's Enforcement Clause).

[31] *Deep South Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972), is not to the contrary. That case stands for the unexceptional position that Congress, in exercising its authority to "promote the Progress of Science and useful Arts," may withhold some rights from copyright and patent holders. See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 433 (1984). It nowhere suggests that Congress may enact statutes that do *not* "promote the Progress of Science and useful Arts."

build on the work of their predecessors. The public domain is the reservoir for the raw material that authors and inventors use to create new writings and discoveries.[32] The enrichment of the public domain is not a by-product of the "limited times" restriction but its purpose — it is the means that the Framers chose to ensure that our copyright and patent system would promote the progress of Science and useful Arts.[33]

The Framers' understanding of the need for limited terms had been shaped by the disastrous English experience with perpetual copyright. The Stationers' copyright, granted by the Tudor monarchs to the stationer's publishing cartel, functioned to suppress both dissent and competition.[34] The censorship and anticompetitive effects of the Stationers' copyright had led the English Parliament to abolish perpetual copyright and enact in its place a limited, fourteen year exclusive right to print and publish books, subject to a single fourteen year renewal if the author survived the expiration of the initial term.[35] The first U.S. copyright statute adopted the same

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[32] See David Lange, *Recognizing the Public Domain*, 44 L. & Contemp. Probs. 147 (1981).

[33] See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 428 (1984); L. Ray Patterson & Stanley Lindberg, *The Nature of Copyright: A Law of Users' Rights* 47-55 (1991).

[34] See Lyman Ray Patterson, *Copyright in Historical Perspective* 28-142 (1968).

[35] The influence of the English experience with the Stationers' copyright on the Framers' design of the Copyright and Patent Clause has been explored by a number of legal scholars. See Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 Wayne. L. Rev. 1119 (1983); Paul J. Heald & Suzanna Sherry, *Implied Limits on The Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1144-50; Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. Intell. Prop. L. 1, 9-16 (1997); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1, 19-36 (1987); Pamela Samuelson,

duration provision.[36]

The "limited Times" restriction is even more important today than it was in 1790, when Congress enacted the first copyright statute. Until 1976, the vast majority of potentially copyrightable works entered the public domain upon publication, because the law required authors to affirmatively claim copyright protection by affixing copyright notice to publicly distributed copies.[37] Of the minority of potentially copyrightable works that gained copyright protection through publication with notice, most entered the public domain at the expiration of the 28-year initial term, because the author failed to apply for copyright renewal. A 1960 Copyright Office study concluded that only 15% of registered works due to enter the public domain were renewed.[38]

In the years since 1976, Congress has amended the copyright law to remove most of the conditions and requirements that limited copyright protection.[39] Today, after several amendments, copyright is completely automatic, vesting in all eligible works at the moment of

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Copyright, Commodification, and Censorship: Past as Prologue – But to What Future?, in The Commodification of Information 63 (Neil Netanel and Niva Elkin-Koren eds., forthcoming 2002).

[36] See An Act for the Encouragement of Learning, § 1, 1 Stat. 124 (1790); Tyler Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyr. Soc'y 19, 29-30 (2002).

[37] See Copyright Act of March 4, 1909, § 9, 35 Stat. 1075, *repealed by* Pub.L. No. 94-553, 90 Stat. 2541 (1976).

[38] See Barbara Ringer, *Study Number 31: Renewal of Copyright* 187 (1960), *reprinted in* Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess., Copyright Law Revision (Comm. Print 1960).

[39] See 1976 Copyright Act § 302, Pub.L. No. 94-553, 90 Stat. 2541 (1976); Berne Convention Implementation Act §7, 102 Stat. 2853 (1988); Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (codified as amended in 17 U.S.C. § 304) .

creation and continuing until 70 years after the author's death.[40] Neither publication nor notice of copyright is required. Works protected under the old system are still in theory subject to a renewal condition, but renewal vests automatically. The copyright owner need take no affirmative steps to renew.[41] Today, essentially everything that is eligible for copyright is protected by copyright. The limited term of copyright is the only remaining device for enriching the public domain.

The limited term, though, has been getting less limited. In 1976, after a series of interim extensions, Congress gave works with subsisting copyrights the benefit of a nineteen-year addition to their copyright term. In 1998, Congress enacted the CTEA, adding a 20-year term extension to all works, including the same works it had previously prevented – by prior term extension and automatic renewal – from entering the public domain. In the words of Professor Peter Jaszi, these repeated extensions resemble "perpetual copyright on the installment plan."[42]

The public domain, moreover, is under attack on another front. In the years since the first copyright statute, we have seen a remarkable expansion in both the works entitled to copyright and the breadth of the exclusive rights included in the grant.[43] In the early years of U.S. copyright law, copyright encompassed only a limited set of uses of copyrighted works. Copyright owners had no rights to prohibit or license translations, abridgements, performances or displays; those belonged to the public

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[40] See 17 U.S.C. §§ 201, 302.

[41] See 17 U.S.C. § 304.

[42] *1995 Senate Hearing* at 72 (testimony of Peter A. Jaszi, Washington College of Law).

[43] See David Lange, *Recognizing the Public Domain*, 44 L. & Contemp. Probs. 147 (1981).

even during the copyright term.[44] Today, those uses are firmly at the core of the copyright owners' exclusive rights. The recent expansion in the subject matter and scope of copyright has made the copyright grant more costly to the public, and has made the "limited Times" restriction even more important.[45]

B. THE EXTENSION OF THE TERMS OF EXISTING COPYRIGHTS EXCEEDS CONGRESS'S POWER UNDER THE COPYRIGHT AND PATENT CLAUSE

The CTEA's extension of existing copyrights oversteps Congress's power under the Copyright and Patent Clause. It does not plausibly promote "Progress of Science and useful Arts," and it violates the "limited Times" restriction.

1. The Extension Does Not Encourage The Creation Of New Works Of Authorship.

As the Court made clear in *Graham v. John Deere*, Congress may not enlarge the monopolies it creates under the Copyright and Patent Clause unless doing so will promote "[i]nnovation, advancement, and things which add to the sum of useful knowledge." But respondent has not claimed, as it could not, that Congress's purpose in extending extant copyrights was to encourage authorship retroactively.[46] The works covered by those copyrights

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[44] See, e.g, *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1, 53-63 (1987).

[45] See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180, 1195-96 (1970); L. Ray Patterson, *Copyright in the New Millennium: Resolving the Conflict between Property Rights and Political Rights*, 62 Ohio St. L.J. 703 (2001).

[46] See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1169.

were created long ago. One cannot reach back into the past and persuade their authors to have created them.[47]

2. The CTEA Does Not Harmonize U.S. Copyright Terms With Europe's And, In Fact, Heightens The Disparity Between Some Copyright Terms.

Respondent has characterized the Copyright Term Extension Act as a statute that matches U.S. copyright terms to the copyright terms prescribed by the European Union. See *Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001). The benefits to copyright owners of a uniform term throughout the global marketplace are said to justify extending the copyright term. That assertion is difficult to defend: "The desire to cooperate with the international community may be a worthy goal, but it is not a blanket justification for passing otherwise unconstitutional legislation." Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1171. This case does not, however, require decision of that question, since the Copyright Term Extension Act was not designed to, and does not, achieve harmonization of copyright terms with Europe.

United States copyright law measures copyright duration in two ways. Since 1978, works authored by identified natural persons receive a copyright term based on the life of the author. Until the enactment of the CTEA, that term was life of the author plus 50 years; today it is life of the author plus 70 years. 17 U.S.C. § 302(a). Works made for hire, and anonymous and pseudonymous works, receive a copyright term calculated from the date of the

[47] See Dennis S. Karjala, *The Term of Copyright, in* Laura N. Gasaway, *Growing Pains: Adapting Copyright for Libraries, Education and Society* 33, 50 (1997).

work's creation or first publication.[48] Before the enactment of the CTEA, that term was 100 years from creation or 75 years from publication. Today, it is 120 years from creation or 95 years from publication. 17 U.S.C. § 302(c).

The CTEA also extended the copyright term for works that were protected by federal copyright laws before the effective date of the 1976 Copyright Act. Before 1976, those works had received a 28-year copyright term that could be renewed for an additional 28 years. In 1976, Congress granted a 19-year extension, and in 1992, Congress made renewal of the copyright term automatic. Thus, before the CTEA, works published or registered before 1978 had a copyright term of 75 years. The CTEA lengthened their term further, to 95 years. 17 U.S.C. § 304.

In the European Union, works authored by identified natural persons receive a copyright term of life plus 70 years. *Council Directive 93/98/EEC* at Art. 1(1).[49] Few EU nations apply the work for hire doctrine (under which the employer of the natural person who creates a work of authorship is deemed to be the author of the work, see 17 U.S.C. § 201(b)), but the EU Directive does recognize works for which the copyright is owned by legal persons rather than authors. For those works, and for anonymous and pseudonymous works, the copyright term is set at 70 years after the work is first made available to the public. *Council Directive 93/98/EEC* at Art. 1(3), Art 1(4).[50]

[48] The Copyright Office does not keep current statistics on the percentage of registrations that are for works made for hire. As of 1955, works made for hire accounted for 40% of copyright registrations. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 n.4 (1989).

[49] See, e.g., Irish Copyright and Related Rights Act 2000, ch 3, §24(1); Netherlands Copyright Act 1912 art. 37(1).

[50] The European concept of making a work available to the public is broader than publication under U.S. copyright. A work may be widely available but still remain unpublished under U.S. law. See,

Thus, before Congress enacted the CTEA, U.S. terms calculated on the basis of the life of the author were 20 years shorter than their European counterparts, while U.S. terms for works made for hire and anonymous and pseudonymous works were *already* at least five and as much as 30 years longer than their European counterparts. The CTEA *increased* the disparity between U.S. and EU terms, for the latter category of works, to at least 25 and as much as 50 years. Thus, while sections 102(b)(1) & (2) of the CTEA could be said to promote harmonization, sections 102(b)(3), (4) & (5) were antithetical to it.[51]

In some instances, the CTEA extended U.S. copyright terms that were simply incommensurable with their European counterparts. For works authored by identified natural persons before 1976, the U.S. measures the copyright by the age of the work, while Europe measures it by the life of the author. As the example of H.G. Wells's novels demonstrates, works created and published early in an author's life expired earlier under the U.S. system, while works published late in the author's life might enter the public domain later than in Europe. Instead of revising the fixed 75-year term to match the EU term of life plus 70 for works authored by natural persons and 70 years for works made for hire, Congress simply added an additional 20 years to all copyright terms.[52]

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e.g., *Estate of Martin Luther King Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999); *Academy of Motion Picture Arts & Sciences v. Creative House Promotions Inc.*, 944 F.2d 1446 (9th Cir. 1991).

[51] Sections 102(c) and (d) were antithetical to harmonization in the same way, insofar as they applied to works made for hire and anonymous and pseudonymous works; there as well, the CTEA extended copyrights that were already longer than in the EU.

[52] Similarly, under the EU Directive, sound recordings are protected for a term of 50 years. *Council Directive 93/98/EEC*, at Art. 3(2). The copyright term for motion pictures is based on the lives of its principal creative contributors. *Id.* at Art. 2(2); see, e.g., Netherlands Copyright Act 1912, at Art. 40. Before and after the CTEA, there is little relationship between U.S. and EU copyright terms for sound recordings, typically measured by the life of the author in the U.S. and by a flat term of years in the E.U. and for motion pictures, typically measured by a term of years in the U.S. and by the authors' lives in the EU.

None of the supposed benefits of harmonizing copyright terms flow from those amendments: an author's works will still enter the public domain at different times in different jurisdictions. The only effect of these amendments is to give a windfall to current proprietors of works first published or registered during the 55 years between 1923 and 1978, and to put off for another 20 years the already-delayed entry of those works into the public domain.[53]

The failure of the CTEA to promote genuine harmonization of copyright terms should not be surprising. The primary purpose of the extension act was not harmonization, but to prevent works from entering the public domain. Congress amended copyright terms to match the terms prescribed by the European Union where doing so would increase the copyright term, and delay for 20 years the works' entry into the public domain. In cases in which the U.S. term already significantly exceeded the term granted in Europe, Congress extended the U.S. copyright terms further, in order to postpone the entry of those works into the public domain, despite the fact that doing so would *increase* the disparity between U.S. and European terms.

3. *The CTEA Is Not Justified By An Increase In The Commercial Life Of Copyrighted Works.*

Witnesses and members of Congress suggested that the fact that works of authorship now enjoyed a longer

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[53] See William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 Notre Dame L. Rev. 907 (1997).

commercial life obliged Congress to extend the copyright term to enable copyright owners to continue to earn money from the exploitation of their parents', grandparents', or employees' works for as long as such exploitation remained profitable.[54] This implies that the public domain is intended to be a repository for only those works that are no longer marketable. Under that rationale, the symphonies of Ludwig Van Beethoven (1770-1827) would be protected indefinitely. The basis for restricting copyright terms to "limited Times" is to enable broad public availability while the work is still valuable.

Moreover, the expiration of copyright does not prevent authors from continuing to develop and exploit their creations; it simply allows the public unrestricted access on an equal footing. Copyright owners who control works that remain profitable many years after they were created will, even after the works enter the public domain, continue to exercise control over and to earn revenue from any derivative works created after the initial work. See 17 U.S.C. § 103(b). When the copyright in the 1928 film *Steamboat Willie*, the first motion picture featuring Mickey Mouse, expires, the original black and white cartoon of Mickey Mouse will enter the public domain. Disney will continue to control and earn revenue from more recent renditions of Mickey, along with hundreds of works based on Mickey Mouse created in the years since *Steamboat Willie* appeared. Each of those works is copyrightable in its own right. Disney's revisions, adaptations, and elaborations of the character will continue to enjoy copyright protection until the copyrights in the derivative

[54] See *1995 Senate Hearing* at 18 (testimony of Marybeth Peters, Register of Copyrights); *id.* at 59-62 (statement of Ellen Donaldson, daughter of composer Walter Donaldson); *1995 House Hearing* at 272 (statement of Mary Ellin Barrett, daughter of composer Irving Berlin).

works expire,[55] just as Disney enjoys copyright protection for its many adaptations of other public domain works.[56]

Even if the growth in the commercial life of copyrighted works were an adequate justification for a prospective extension, it would still fail to support a retrospective one. Congress's overriding purpose in enacting the CTEA was to prevent works from entering the public domain, extending the period in which copyright holders would collect royalties. But this wealth transfer to copyright holders from the public at large brought with it none of the countervailing benefits required by the Copyright and Patent Clause.[57] By attempting to ensure that authors' grandchildren could wring every last drop of commercial value remaining in a work before it enters the public domain, Congress violated the bargain implicit in Art 1, § 8, cl. 8.

II. THE COPYRIGHT TERM EXTENSION ACT VIOLATES THE FIRST AMENDMENT

In addition to overstepping Congress's power under the Copyright and Patent Clause, the CTEA is unconstitutional for a second, independent reason: It violates the First Amendment.

A. COPYRIGHT LAWS RESTRICT SPEECH

[55] In addition, courts have held that rights under the Lanham Trademark Protection Act, 15 U.S.C. §§ 1051-1127, survive the expiration of a copyright or patent. See, e.g., *Frederick Warne & Co. v. Book Sales, Inc.*, 481 F. Supp. 1191 (S.D.N.Y. 1979) (copyright); *In re Worlds Finest Chocolate, Inc.*, 474 F.2d 1012 (C.C.P.A. 1973) (design patent). See generally Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. Miami Ent. & Sports L. Rev. 429 (1994).

[56] See, e.g., *Alice in Wonderland* (1951); *The Hunchback of Notre Dame* (1996); *Snow White and the Seven Dwarfs* (1937).

[57] See Richard Epstein, *Congress's Copyright Giveaway*, Wall Street Journal, Dec. 21, 1998, at A19.

Copyright laws impose restrictions on speech, and thus implicate the First Amendment. The essence of a copyright statute, after all, is to make it actionable to publish certain speech. If a court finds that the language of a newspaper article infringes the language of some other literary work, then it can enjoin the author from further publication, or order her to pay statutory damages flowing from the publication. Copyright gives the government authority to seize books and newspapers and the machines used to publish them; if a jury finds by a preponderance of the evidence that books are infringing, the court can order them destroyed. It is difficult to imagine a more stark restraint on speech. "Whenever the law permits the sheriff to walk into people's offices and confiscate their publications, or levy against their belongings because of something they said or how they said it, the First Amendment is deeply implicated."[58]

This is not a new idea. It is the thesis of the foundational article on the relationship between copyright and the First Amendment: Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180 (1970).[59]

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[58] Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 Berkeley Tech. L.J. 535, 553 (2000); see also, e.g., Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev. 1 (2001); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431 (1998).

[59] The Nimmer article provided the initial basis for the Court's case law on copyright and the First Amendment. *See* Neil Netanel, *Locating Copyright in the First Amendment Skein*, 54 Stan. L. Rev. 1, 10-11 (2001). The Court first cited it in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977), and numerous courts followed suit. In *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), the Court approved the "definitional balance" approach the article originated, and cited Nimmer's treatise, which in turn cited and relied on his earlier article. See *id.* at 556; cf. *id.* at 548, 549, 551, 552, 554, 556, 560, 562, 563, 564, 566, 567, 568 (citing the treatise for various points).

Nimmer's article noted that the copyright statute, by punishing expression, "fl[ies] directly in the face" of the First Amendment. *Id.* at 1181. Nimmer urged, though, that a court could strike a balance between the government interests promoted by copyright, and the speech interests it impinged on, through "definitional balancing" such as that the Court used in the libel context in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See 17 UCLA L. Rev. at 1184. In general, he continued, a rule that copyright could extend to expression but not to ideas represented an acceptable definitional balance. "In some degree it encroaches upon freedom of speech . . . but this is justified by the greater public good in the copyright encouragement of creative works." *Id.* at 1192.

However, Nimmer explained, copyright even in expression will not necessarily have adequate First Amendment justification. In particular, he stressed, the First Amendment bars an inappropriately long copyright term – as the copyright term lengthens into perpetuity, the incremental incentive it provides vanishes, so there is nothing on the copyright side of the First Amendment balance. *Id.* at 1193. Similarly, should Congress seek to extend the copyright term for already existing works, the extension serves no interest that could be balanced against the speech interest it disserves. *Id.* at 1195.

A broad consensus of legal scholars, over the years, has adhered to the view that copyright law, as a restriction on speech, is subject to First Amendment constraints.[60]

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[60] See, e.g., Floyd Abrams, *First Amendment and Copyright*, 35 J. Copr. Soc'y 1 (1987); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 Vand. L. Rev. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*,

Nevertheless, the D.C. Circuit stated that copyright is "categorically immune" from First Amendment scrutiny. None of the court's purported or possible justifications for that far-reaching statement hold up to analysis.

1. *Harper & Row Did Not Hold That Copyright Laws Are Immune From First Amendment Scrutiny.*

The D.C. Circuit insisted that this Court's decision

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28 Conn. L. Rev. 981 (1996); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 Calif. L. Rev. 283 (1979); Gary L. Francione, *Facing The Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. Pa. L. Rev. 519 (1986); Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on The Internet*, 16 Cardozo Arts & Ent. L.J. 1 (1998); Charles C. Goetsch, *Parody as Free Speech--The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. New Eng. L. Rev. 39 (1980); Paul Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983 (1970); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998); Michael J. Madison, *Complexity and Copyright in Contradiction*, 18 Cardozo Arts & Ent. L.J. 125, 159-73 (2000); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1 (2001); Hon. James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 Hofstra L. Rev. 983 (1990); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1 (1987); David E. Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises*, 1986 BYU L. Rev. 983 (1986); Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 Berkeley Tech. L.J. 777 (2000); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. Rev. 1 (2000); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431 (1998); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 Emory L.J. 393 (1989); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 Cardozo Arts & Ent. L.J. 79 (1996); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 Wm. & Mary L. Rev. 665, 666 (1992).

in *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), forbade any First Amendment scrutiny of copyright law provisions. *Eldred v. Reno*, 239 F.3d at 375. But *Harper & Row* did not say that. The Court in *Harper & Row* noted that copyright serves important public goals that enrich the system of freedom of expression. It is "the engine of free expression": by enhancing the economic incentives for authorship, it stimulates the creation of useful works and thus serves the general public good. 471 U.S. at 558. The Court rejected a claim that the First Amendment forbade copyright liability for publishing a particular article of great public interest, finding that the First Amendment was implicated but not overthrown: Defendant's constitutional claim failed in light of "the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." *Id.* at 560.

The Court's decision in *Harper & Row* sends a crucial message: The mere fact that copyright statutes *implicate* the First Amendment does not mean that they *violate* the First Amendment. As a general matter, a statute implicating free-speech rights will be upheld if it is sufficiently narrowly tailored to advance sufficiently important government interests. Most copyright legislation advances the important government interest in providing incentives for creation, and should be upheld where it is adequately narrowly tailored to those goals. Notwithstanding defendant's claim in *Harper & Row* that its infringement enabled its publication of material of great public interest, the Court deemed the copyright statute before it to be sufficiently closely tailored to withstand defendant's First Amendment attack.

The most important reason copyright law and the First Amendment have coexisted for two centuries with

only infrequent clashes is that copyright rights are limited both in scope and in time. A significant increase in either the scope or duration of copyright necessarily implicates the First Amendment balance. For this reason, the Court's opinion in *Harper & Row* should be read cautiously. One of the most troubling aspects of copyright in recent years is that the limitations on copyright liability, including the idea-expression distinction and fair use, have been steadily shrinking via judicial construction; at the same time, copyright owners' exclusive rights have been growing.[61] Nothing in *Harper & Row* approves new copyright law that, by virtue of legislative amendment and judicial reinterpretation, is substantially less speech-protective than the copyright law before the Court in that case.

The lasting lesson of *Harper & Row*, on the contrary, is that the First Amendment is relevant to copyright law.[62] When a court hears a First Amendment challenge to copyright legislation, it must satisfy itself that the statute is sufficiently narrowly tailored to withstand constitutional attack.

2. *The Idea/Expression Distinction Does Not Immunize Copyright From First Amendment Scrutiny.*

The D.C. Circuit urged that regulation of

[61] See Jessica Litman, *Digital Copyright* 77-88, 175-176 (2001); Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev. 1, 12-30 (2001; Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 Berkeley Tech. L.J. 777 (2000).

[62] The First Amendment has been held to limit government enforcement of a wide range of private rights, even where the laws creating those rights – like copyright – have internal limits that help protect First Amendment values. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2000); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964). See generally Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev. 1, 4 (2001).

expression raises no First Amendment concerns so long as the law allows the free communication of *ideas:* the copyist can express his thoughts in a different, non-infringing form. This is a fundamental misconception. While the Court held in *Harper & Row* that the idea/expression distinction helps copyright statutes *survive* First Amendment scrutiny, it does not follow that copyright statutes are not *subject* to First Amendment scrutiny. On the contrary, under black-letter First Amendment law, even where a speech restriction leaves people free to convey their ideas in another manner, its restriction of expression must nonetheless be narrowly tailored to important government interests. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (subjecting to First Amendment analysis a regulation limiting the loudness of music at public concerts). The Court has made clear that freedom of speech implicates the ability to choose one's words as well as one's ideas. See *Cohen v. California*, 403 U.S. 15 (1971) (rejecting the state's contention that it could forbid Cohen to wear a jacket emblazoned "Fuck the Draft" because he could convey the same idea using other words).[63]

3. *Characterizing Copyright As A Property-Rights Regime Does Not Immunize It From First Amendment Scrutiny.*

[63] See also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 570 (1995) ("Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.").

Copyright's bar, it is important to note, goes far beyond literal copying; it covers translations, fictionalizations, and "any other form in which a work may be recast, transformed, or adapted." See 17 U.S.C. §§ 101 (definition of derivative work), 106(2); see Hannibal Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 Berkeley Tech. L.J. 777 (2000). One cannot seriously argue that such a bar to speech has no impact on First Amendment concerns.

Finally, one court has suggested that the First Amendment is irrelevant to copyright because copyright merely vindicates property rights.[64] This is incorrect as well. Enforcement of property rights *in land*, to be sure, does not raise substantial First Amendment concerns. A speaker does not have a legal right to commandeer the printing presses of the *Washington Post* for her own expression. The reason is that the laws of real and tangible personal property are neutral laws of general applicability, unrelated to speech and with only incidental effects on it. "[T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[65] The Court has repeatedly so held in the context of laws that regulate a broad swath of activity and encompass speech only incidentally.

But that principle does not apply when a law -- even one with goals unrelated to the suppression of speech -- regulates speech in particular. The copyright statute is such a law. It regulates speech and speech alone. The rights it announces have no general applicability. They are property rights *in speech*. In *Turner Broadcasting System v. FCC*, 512 U.S. 622, 640 (1994), the government urged that rules requiring cable systems to carry broadcast channels should be seen as neutral laws with no special First Amendment applicability, mere "industry-specific antitrust legislation." The Court disagreed. Laws regulating speech and singling out particular categories of

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[64] See *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979). But see *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir. 1987).

[65] *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972); see also *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws.").

speakers, it explained, cannot be seen as neutral; they always get heightened constitutional scrutiny. [66]

B. THE CTEA CANNOT SURVIVE FIRST AMENDMENT SCRUTINY

Once subjected to First Amendment scrutiny, the CTEA cannot survive. Even a content-neutral restriction of speech must further an important and factually demonstrable government interest, and must advance that interest sufficiently to justify its abridgement of expressive activity. *Turner Broadcasting v. FCC*, 512 U.S. 622, 664-65 (1994). Neither the CTEA's extension of copyrights in existing works, nor its copyright extension for works not yet created, satisfies that test.

The CTEA's extension of copyrights in existing works advances no legitimate government interest. The government, to be sure, has an important stake in providing incentives for the creation of new works. But the CTEA's extension of existing copyrights does not advance that interest. Nor do its provisions harmonize our copyright law with Europe's. The CTEA is highly valued by the beneficiaries of the additional copyright monopoly it granted for old works. It extends, both in Europe and in the U.S., the period during which they will continue to control and profit from those works. But Congress's desire to provide those entities with a naked wealth transfer cannot justify its restriction of speech.

The CTEA's extension of future copyrights is invalid as well. Congress has great discretion to determine the appropriate length of a copyright term in order to

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[66] 512 U.S. at 640-41; see also *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105, 117 (1991); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 534 (1987) (subjecting to First Amendment scrutiny a law granting a private entity "a limited property right in the word 'Olympic'").

stimulate authorship and wide distribution of new works, while ensuring that the public gains unrestricted access to those works after a period of limited duration. Where Congress determines that the existing copyright term is inadequate, extending the duration of copyright prospectively is an appropriate response. The Court should defer to such a "predictive judgment[]" so long as it is "based on substantial evidence." 512 U.S. at 666. But the Court cannot defer to a judgment Congress never made. There is nothing in the legislative record to suggest that Congress found the pre-CTEA terms inadequate. Witnesses and members of Congress described the U.S. copyright system as extraordinarily successful.[67] Indeed, the evidence presented to Congress on the extension's incentive value demonstrated that it would be insignificant, because the discounted present value of the extended term would be negligible.[68] And the prospective extension, like the retrospective one, does not harmonize U.S. and European copyright law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[67] See *1995 Senate Hearing* at 26 (prepared statement of Bruce A. Lehman, Commissioner of Patents); testimony cited *supra* note 21.

[68] See *1995 House Hearing* at 300 (written testimony of Dennis Karjala); *id.* at 420 (remarks of Rep. Hoke); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1173.

APPENDIX

AMICI CURIAE

Amici file this brief in their individual capacities, and not as representatives of the institutions with which they are affiliated.

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IN THE

Supreme Court of the United States

ERIC ELDRED, et al., *Petitioners*,
v.
JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF COLLEGE ART ASSOCIATION, VISUAL RESOURCES ASSOCIATION, NATIONAL HUMANITIES ALLIANCE, CONSORTIUM OF COLLEGE AND UNIVERSITY MEDIA CENTERS AND NATIONAL INITIATIVE FOR A NETWORKED CULTURAL HERITAGE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the District of Columbia Circuit err in holding that Congress has the power under the Copyright Clause to extend retrospectively the term of existing copyrights?

Is a law that extends the term of existing and future copyrights "categorically immune from challenge[] under the First Amendment"?

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INTEREST OF THE *AMICI CURIAE*[1]

The College Art Association (CAA) is a membership organization representing 14,000 artists, art historians, scholars, curators, collectors, educators, art publishers and other visual arts professionals who, by vocation or avocation, are concerned about and are committed to the practice of art, teaching and research about the visual arts and humanities. Another 2,000 university art and art history departments, museums, libraries and professional and commercial organizations are institutional members of CAA.

The Visual Resources Association (VRA) is a professional society with more than 600 members devoted to advancing knowledge, research and education in the field of visual information research. The Association offers a forum for issues surrounding documentation and access to images of visual culture, integration of technology-based instruction and research, intellectual property policy and visual information standards development. Members include art, architecture, film and video librarians; image specialists, including slide, photograph, microfilm and digital archivists; museum curators; galleries; publishers; image system vendors; rights and reproduction officials; photographers; art historians; artists; and scientists. The majority of the VRA membership represents visual resources professionals and librarians working in higher education and museums, managing visual collections of 35mm slides, photographs and digital images to support education and research.

The National Humanities Alliance (NHA) is a coalition of more than eighty associations concerned with national humanities policy. Membership includes associations of scholars and scholarly societies, libraries, museums, state

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

humanities councils, historical societies, institutions of higher education, independent and university-based research centers and university presses. The NHA advocates for support for humanities research and represents its members in matters of policy or legislation affecting work in the humanities.

The Consortium of College and University Media Centers (CCUMC) is an organization whose mission is to provide leadership and a forum for information exchange to the providers of media and technology support for quality teaching and learning at higher education institutions. The more than 650 members represent all sizes of institutions in higher education that provide media and instructional technology-related support services, as well as companies providing related products.

The National Initiative for a Networked Cultural Heritage (NINCH) is a diverse nonprofit coalition of arts, humanities and social science organizations created to assure leadership from the cultural community in the evolution of the digital environment.

SUMMARY OF THE ARGUMENT

Amici's members use, preserve, study, teach, publicly display, publicly perform and create derivative works from works affected by the Copyright Term Extension Act (CTEA). The Act's most immediate prohibitory effects on these activities involve works that were in their second term in 1978 or were works for hire. *See* 17 U.S.C. §§ 302(c), 304(b). Absent the CTEA, significant numbers of these works would have fallen into the public domain within the next few years, making them freely available for a broad range of scholarly, creative and educational purposes. The CTEA applies retrospectively, extending the terms of these subsisting copyrights by twenty years. This term extension especially penalizes scholars, museums, teachers and artists – *amici*'s members – whose work centers around works of the past: They have been deprived of their ability to use these works without risking suit for infringement for at least twenty additional years.

That *amici*'s members either may rely on the fair use provisions of the Copyright Act or wait two decades from now to have the unfettered right to use these works is no palliative. Fair use, which in theory is available to mitigate the substantial restraints that copyright imposes on free speech, is in practice unpredictable and uncertain – especially for uses of images and in published work. The direct result of the CTEA is that *amici*'s members are forced to self-censor their speech with respect to works that otherwise would be in the public domain.

As *amici*'s members experience daily, retrospective term extension directly restricts expression. Therefore, it must be evaluated under the exacting standards set forth in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994) (*Turner I*) and *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180 (1997) (*Turner II*). As the *Turner* cases reaffirmed, content-neutral regulations of speech are constitutional only if they further a substantial governmental interest unrelated to the suppression of free expression and restrict no more speech than necessary.

Retrospective term extension miserably fails *Turner* scrutiny: The evidence before Congress demonstrated that there could be no justification for extending subsisting copyrights, other than to add an extra twenty years of potential revenue to the relatively small number of works that had proved enduringly successful. This subsidization of a few works of a few copyright owners – who already have received significant value from their ownership under the preexisting term – is not narrowly tailored and cannot justify the widespread suppression of speech that is the inevitable and demonstrable consequence of the CTEA. As a result, prospective term extension further tips the copyright balance away from legitimate expressive use of copyrighted works.

ARGUMENT

I. Retrospective Term Extension Severely Inhibits a Wide Range of Expression in Ways That Congress Failed To Consider.

Amici's members use copyrighted expression to teach, to incorporate into scholarship or art, and to express a thought in the most persuasive way, all of which is core First Amendment speech.[2] For their purposes, there often is no substitute for the full image of a work of art or a photograph. The Court has recognized that images in particular may have visceral impact that text cannot convey. *See Texas v. Johnson*, 491 U.S. 397, 405 (1989) ("The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.") (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)); *Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring and dissenting in part) ("The adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute."). *Amici*'s members also use literary works, music and other materials. Their ability to demonstrate and persuade depends on their showing readers, viewers and students what they are talking about – in short, it depends on their ability to copy, display or perform copyrighted works.

Retrospective term extension limits this type of speech in a multiplicity of ways. Congress considered none of them.

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[2] A scholar's or artist's choice of what speech to reproduce or endorse is subject to the highest constitutional protection. "Selecting which speech [to copy and distribute] is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader's Digest, no less communication than is creating the speech in the first place." *Turner I*, 512 U.S. at 675 (O'Connor, J., concurring and dissenting in part); *see also Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1302 (7th Cir. 1993) ("A city may not limit booksellers to vending the works they write themselves . . . . That adopting the expression of others is a form of speech we freely concede.").

In *Turner I*, the Court noted that the record before it lacked findings on the effects of the regulation on the "losers" – the cable operators whose speech was suppressed in order to promote the speech of local broadcasters. 512 U.S. at 667-68. Without that information, essential to evaluating whether the regulation was narrowly tailored, reversal and remand was required.

When it enacted the CTEA, Congress repeated that mistake: It did not balance the possible advantages of retrospective term extension to owners of older lucrative copyrights against the harms to the freedom of all the other speakers – such as the art historians, scholars and artists – whose work is studying the past. Congress did not, as the First Amendment requires, make a reasoned judgment that the "burden imposed" on speakers was "congruent to the benefits [the retrospective term extension] affords," *Turner II*, 520 U.S. at 215. Its failure to do so, in and of itself, is a basis for reversing the judgment of the Court of Appeals.

A. Retrospective Term Extension Substantially Inhibits Scholarship, Teaching and Creativity.

In the past, researchers could anticipate and plan on new material becoming available for unrestricted use on a constant and continuing basis. Retrospective term extension, however, "puts a 20-year moratorium on the public domain" and completely upsets those expectations. Minority Views of Sen. Brown, S. Rep. No. 104-315 (July 10, 1996). It makes use of older works impossible – or nearly so – in many instances. Because *amici*'s members need to use such works, but are unable to rely on fair use for much of their most important expression, *see infra* Section I.B, they must obtain permission for each use. That permission, however, can often be impossible to obtain.

To begin, scholars and researchers have immense difficulties even finding successors in interest to the copyright owners of many decades past. *Amici*'s members routinely engage in expensive, time-consuming and often fruitless searches for the copyright owners of these older works. The process often begins with genealogy –

attempting to determine the author's heirs – and ends at the telephone book.[3]

The problem is multiplied for institutions with substantial collections. The Memorial Art Gallery in Rochester, New York wished to reproduce works it owns in publications, as in slide sets for local area teachers as part of educational programs, or on the Internet for other teachers. It has difficulty, however, finding copyright owners for works many decades after their creation. *Cf. Reno v. American Civil Liberties Union*, 521 U.S. 844, 876-77, 881-82 (1997) (law making it "prohibitively expensive" or economically infeasible to determine when speech was lawful unconstitutionally restricted speech).

Moreover, the extraordinary costs in time, energy and money needed to engage in a search for a copyright owner frequently deters would-be speakers from doing so. On their side, copyright owners may refuse permission simply because their transaction costs are too high – the administrative costs involved outweigh the small fees that the copyright owner might recoup. As a result of retrospective term extension, all of these difficulties now persist for another twenty years and, as the date of original authorship recedes ever further in time, they are significantly exacerbated.

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[3] *See, e.g., The Copyright Term Extension Act of 1995, Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 42 (Sept. 20, 1995) [hereinafter *1995 Hearing*], at 18 (Statement of Marybeth Peters, Register of Copyrights [hereinafter Peters]):

> [I]t is exceedingly difficult to determine the copyright status of certain types of works, e.g., photographs, prints and labels. Moreover, finding the current owner can be almost impossible. Where the copyright registration records show that the author is the owner finding a current address or the appropriate heir is extremely difficult. Where the original owner was a corporation, the task is somewhat easier but here too there are many assignments and occasionally bankruptcies with no clear title to works.

This inability to clear rights to older works has enormous practical consequences for scholars, teachers and artists, none of which were explored by Congress. For example, "Who Built America?" is a pathbreaking, award-winning CD-ROM series containing many primary sources from the Depression Era for high school and college students. Its authors had immense difficulties tracking down copyright owners, who, when found, sometimes wanted large payments for older works whose only present value was historical. In numerous instances, the authors substituted federal government works and other public domain works for their preferred choices.[4] The authors were forced to leave out works entirely – Huey Long's 1935 campaign song, "Every Man a King," as well as brief excerpts from popular films of the time, for example – because copyright owners insisted upon thousands of dollars for minor uses. In other cases, such as excerpts from *Cane*, the 1923 novel by well-known Harlem Renaissance author Jean Toomer, they invested months of effort and hundreds of dollars in acquiring permissions, draining their limited budget and time.

Amici's members overwhelmingly report that this experience is typical. Permission fees for single images, short excerpts and other short works routinely run into the hundreds of dollars, if they are available at all. To take another example, "The Video Encyclopedia of the Twentieth Century," a resource used by CCUMC members and other

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[4] Likewise, Thomas Thurston of Teachers College at Columbia University, Project Director of the New Deal Network, has found that the bulk of primary documents available via popular digital sources, including the New Deal Network, emphasize government over society. These online and easily accessible materials are becoming the raw materials used by high school teachers and others to teach the history of the 1920s and 1930s. The New Deal Network, for example, offers primary sources, lesson plans, web projects and bibliographic materials on the Great Depression. Absent Disney, Warner Brothers and Gershwin, the New Deal being represented digitally appears to play a far greater role in American culture of the period than it actually did.

higher education institutions, makes enormously valuable documentary footage available to scholars and students. Difficulties in rights-clearance, however, have left gaping holes in this resource.

Copyright owners also have been known to refuse permission for scholarly works because they disagree with the content.[5] Julia Foulkes, a cultural historian at the New School University, for example, was denied permission to quote letters from a dancer in her book on the development of modern dance in the 1930s and 1940s on the basis of what the copyright owner deemed Foulkes' "race/gender agenda." Professor Jonathan Fineberg of the University of Illinois, a longtime CAA member and a past member of its Board of Directors, wanted to use a photograph of Picasso watching his daughter draw in his well-known book *The Innocent Eye: Children's Art and the Modern Artist* (Princeton Univ. Press 1997). The photograph was the most important documentation for Professor Fineberg's argument about Picasso's use of his children's drawings in his own work. The copyright owner disagreed with the interpretation and refused permission. Two publishers declined to chance a fair use defense. Ultimately, Professor Fineberg was forced to abandon the photograph, weakening and censoring his argument.[6]

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[5] Copyright claims that are motivated by disagreement with a defendant's message have, in some cases, advanced to appellate litigation. *See, e.g., Religious Tech. Ctr. v. Scott*, 82 F.3d 423 (9th Cir. 1996) (one of a large number of copyright cases brought by Church of Scientology against critics); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986) ("pro-choice" author sued Catholic priest for copyright infringement). Although the defendants in these cases ultimately prevailed, that they were litigated, at great time and expense, to the court of appeals level simply underscores the tremendous risks run by scholars and publishers who want to rely on fair use. *See infra* Section I.B.

[6] *See also, e.g., Hearings on H.R. 989 Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 104th Cong. (statement of Dennis Karjala, Professor of Law, Arizona State University [hereinafter Karjala *House Statement*]), reproduced in *1995 Hearing, supra*, at 83 n.8 (discussing refusals by estate of Lorenz Hart to allow any biographer who mentions Hart's homosexuality to use Hart's lyrics and Sylvia Plath's husband's exercise of editorial control over biographers).

Other copyright owners simply refuse permission outright. Paul Lauter, the general editor of the Heath Anthology of American Literature and editor of the New Riverside Series of critical editions of classic works (now published by Houghton Mifflin), has been denied permission to use numerous works that would now or soon have been in the public domain absent retrospective term extension. The owner of Ernest Hemingway's copyrights, for example, refuses to allow any anthology to use more than one Hemingway story of any length.[7] This includes stories from *In Our Time*, which was about to come into the public domain before the CTEA. The New Riverside Series had been planning an analytical edition of *In Our Time*, containing additional materials to aid contemporary students in understanding Hemingway's context, but the CTEA's retrospective term extension forced cancellation of those plans. As a result, the only available edition of the book has no notes or commentary.

The New Riverside Series had planned a critical edition of Jean Toomer's *Cane*. The only available edition is outdated and edited by a person who dislikes Toomer. The CTEA now prevents the New Riverside Series from presenting a contrary perspective. Given the current costs of books and limited student budgets, anthologies and critical editions with commentary are essential resources for teaching. Yet even when a publisher is willing to pay, as Houghton Mifflin is, it is often barred from making older works accessible to readers.

Artists and other creators who wish to use older works as part of, or as a starting point for, new works of art also face often insurmountable barriers to doing so. Artists face particular risks in that copyright owners are likely to deny

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[7] The same owner controls F. Scott Fitzgerald's works and allows only a certain number of Fitzgerald's words to be used.

permission to use or "quote" artistically based on their opinions about art and the original artist's reputation. This occurs even though copyright law, in theory, recognizes that owners' interest in reputation should not control commentary on a work, whether the commentary is academic or takes the form of a creative response (such as Marcel Duchamp's famous addition of a mustache to a picture of the Mona Lisa).

Retrospective term extension suppresses artists' creation of new and insightful derivative works. For example, a public art competition is seeking murals for Queens Plaza Station in Long Island City, New York, a subway stop located near the Queens branch of the Museum of Modern Art. Ellen K. Levy, a member of the CAA Board of Directors and a CAA Vice President, and Grace Graupe-Pillard, two artists, are proposing a mural using figures taken from famous artworks by Jacob Lawrence, Henri Matisse, Reginald Marsh, Frida Kahlo and Henri Rousseau. Some of these works are still within copyright as a result of retrospective term extension. The figures would "step out" from their frames to become fellow subway travelers, joining the bustling world outside, depicting a metaphoric journey of converging paths, goals and aspirations. The proposed mural's artistic merit, however, may be outweighed by a difficult or expensive clearance process or a threat of suit over works that would have been in the public domain but for the CTEA.

In another instance, Scott Andrew Hutchins, a writer, wrote a novel, *Tip of Oz*, using characters from the *Oz* series begun by L. Frank Baum. Though over twenty of the forty books in the *Oz* series are in the public domain, one significant plot element of Hutchins's book depends on reference to events in a book that would have fallen into the public domain in 2001 absent the CTEA. The copyright owner refuses to authorize any uses of Baum's characters other than in the International Wizard of Oz Club short story annual. Hutchins is prohibited from publishing his novel.

But for the CTEA, the silent films of the 1920s and 1930s would also have offered substantial opportunities for new expression. Such films used to be accompanied by live musicians. Modern composers have written new scores for them, such as Richard Einhorn's *Voices of Light*, the much-praised work created to accompany the famous 1928 French film *The Passion of Joan of Arc*. Many, however, have been forced to abandon such projects due to the risks of publicly performing older films. *See also* Minority Views of Sen. Kohl, S. Rep. No. 104-315 (July 10, 1996) (noting that great American musicals go unperformed because regional theaters cannot afford licensing fees).

Relatedly, works about art and artists are increasingly difficult to create. Davis Publications, a publisher of numerous art books and student textbooks, often encounters difficulty obtaining permission to print images, including, for example, works owned by the Georgia O'Keeffe Foundation, many of which date from the 1920s and 1930s. Davis has been forced to switch images due to the expense or difficulty of obtaining permissions, thus engaging in deliberate self-censorship.

Scholarly research and teaching have a special place in First Amendment law; scholarship embodies the spirit of free inquiry at the heart of the First Amendment. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Professors and teachers also provide students with the knowledge that can empower them as educated citizens, if they are allowed to do so. *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) (students' right to receive broad range of information and ideas is corollary of First Amendment rights of free speech and press). Art, too, provides unique benefits, illuminating the human condition and expressing thoughts more vividly than otherwise possible. Retrospective term extension substantially undermines the First Amendment value of these endeavors by requiring permissions and clearances, where the public domain would have promoted the interests in expression.

B. Fair Use Is Insufficient To Protect the First Amendment Interests at Stake.

Congress did not consider whether the availability of the fair use doctrine might mitigate the harms caused by retrospective term extension. Uses for scholarship, art and teaching are, of course, at the core of the affirmative defense of fair use afforded by section 107 of the Copyright Act, 17 U.S.C. § 107, particularly when the work at issue is old and lacks present economic value.[8] Indisputably, *amici*'s members rely on the fair use doctrine in many of their activities. Yet the theoretical applicability of the doctrine does not avoid the constitutional infirmities of retrospective term extension, due largely to the widely recognized uncertainties surrounding the availability and application of the doctrine in practice.[9]

The fair use doctrine fails to give publishers the assurance they need that they can publish without

[8] Nonetheless, it is worth noting that any speech that is sold or advertiser-supported is deemed "commercial" and thus less favored under the fair use analysis. As a result, most of the entities with the ability to disseminate speech, including academic publishers, start off with a strike against them. Although First Amendment law limits "commerciality" to speech that proposes a commercial transaction, the law of fair use has no such limit. The situation with regard to images is even worse. In many cases, *amici*'s members need to use all or substantially all of an image, which translates into another strike against them because applying the fair use doctrine also requires consideration of the amount of the original work used. 17 U.S.C. § 107(3).

[9] Even in the academy, there are no clear fair use parameters. Guidelines negotiated by universities and copyright owners provide only minimum standards above which certain copying for classroom use may or may not be fair use, leaving staff and administrators at risk of liability. *See Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions*, H.R. REP. NO. 94-1476, 94th Cong., at 68-70 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5681-83. The Guidelines do not address public display or performance, or use in scholarly works. Likewise, 17 U.S.C. § 110(2), permitting limited transmissions for in-classroom use, does not cover modern, digital distance education. *See* Register of Copyrights, Report on Copyright and Digital Distance Education iii, vii-viii, 144-45 (May 1999).

interference. For instance, Jeff Clark, chair of CCUMC's Government Regulations and Public Policy Committee and Director of Media Resources at James Madison University, surveyed the submission guidelines of a selection of long-established American film study journals and found that most will not publish film frames without express permissions. Furthermore, permission clearance and payment is most often left to the scholar. Other fora for displaying, distributing or performing works express the same concerns. Their routine insistence on clearances from copyright owners inevitably results in self-censorship when clearance is unobtainable.

Examples of such self-censorship by *amici*'s members are legion. Dr. Kate Sampsell, for example, has written *"To Grab a Hunk of Lightning": An Intellectual History of Depression-Era American Photography*, a dissertation that will be published as a book. She has been attempting, with no success, to track down copyright owners of documents supporting a 1932 book, which exposed the horrors of the chain gang for African Americans in Georgia. The repository holding these materials will not allow her to have copies of written materials and images even for her own use, much less for publication. Some of the materials, in fact, were taken from the Georgia Bureau of Prisons, which wanted them suppressed. Before the CTEA, these materials would have fallen into the public domain within a few years from now. Copyright law has succeeded in silencing what segregationists could not.

University presses and academic journals, the principal places where scholarly works are published, are particularly risk averse, because they have few resources with which to defend themselves against suit. They also have numerous less-risky alternatives to a book or article whose author must rely on fair use. Scholarly publishers and journals have a standard practice of requiring authors to indemnify the publishers against infringement claims, and of requiring proof that they have permission for each visual work or extensive quotation they reproduce. CAA members, for

example, repeatedly report that rights issues are so murky that no publisher will take the risk of relying on fair use of images of artwork.

Bruce Robertson, a former member of the CAA Board of Directors and CAA Vice President and the former chair of the Art History Department at the University of California at Santa Barbara, and Robert Dance, an art dealer, had an all-too typical experience when publishing their book, *Ruth Harriet Louise and Hollywood Glamour Photography* (Univ. of Cal. Press & Santa Barbara Museum of Art 2002). They could not use images from *Vanity Fair* or MGM stills because the publisher could not afford the hundreds of dollars to clear the rights for each, and it would not rely on the fair use defense. These images were about to fall into the public domain prior to the CTEA.[10]

C. The CTEA Results in Extensive Self-Censorship in Violation of the First Amendment.

Fearful of liability, publishers are curtailing authors' speech to avoid any risk of a lawsuit, even though they might ultimately prevail on the merits. For instance, a former book editor for St. Martin's Press, Gordon Van Gelder, edited many books about television and film over twelve years. Over time, that publisher increasingly took the position that, if a photographer could not be located, a photograph could not be published. Thus, the number of published books relying on photographs and film stills, as books on film and television inevitably must do, dropped during his tenure.

[10] By definition, retrospectivity provides no incentive for copyright owners to create the existing works to which it applies; it provides a windfall for subsisting copyrights. Uses of such works by scholars and artists should therefore be considered presumptively more "fair," given that the use would have been lawful but for the CTEA. Even this, however, would be insufficient, particularly for uses of an entire work such as a critical edition, because it is already clear that publishers refuse to take chances on uses that are highly likely to be fair uses.

Creators censor themselves rather than engage in futile efforts to have their work published. Jonathan Veitch, Chair of Humanities at New School University, and Julia Foulkes attempted to create a reader on modernism comprising an anthology of magazine editions from the 1920s and 1930s. They abandoned the project after learning of the CTEA because they determined that clearing rights from the magazines, all of which are defunct and many of which lasted only an issue or two, would, if even possible, consume the time and energy that they instead needed to devote to editing and adding critical commentary to the readings.

Publishers' fears are understandable: It is well-settled that the fair use defense must be evaluated on a case-by-case basis, and publishers must therefore be prepared to defend against a suit each time they rely on fair use. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1106–07 (1990) (recognizing fair use's "infinite elasticity").[11] In addition, the burden is on the publisher to prove fair use, as it is an affirmative defense.

It is equally well-settled that such uncertainties are of First Amendment concern because the shadow of the law distorts private speakers' speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-78 (1964). Copyright infringement is a strict liability offense, regardless of a publisher's good-faith belief in its fair use. Strict liability, combined with the substantial burden of sustaining the defense of fair use, is particularly likely to give rise to self-censorship, as *Sullivan* explained in the context of a libel law offering the affirmative defense of truth:

[11] *See also, e.g.*, William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1661, 1692–94 (1988); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. Dayton L. Rev. 587, 612 (1997); Lloyd L. Weinreb, *Fair Use*, 4 Fordham L. Rev. 1291 (1999). These analyses confirm *amici*'s members' fears that reliance on fair use is an open invitation to long-term litigation.

> [W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."

Sullivan, 376 U.S. at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

The costs of self-censorship are identical whether the risk of liability is based on defamation or copyright infringement. Putting the burden on a speaker to rebut a presumption of unlawfulness means that "in every such case the [speaker] must bear the costs of litigation and the risk of a mistaken adverse finding .... This scheme must necessarily chill speech ...." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 794 (1988). *See also Ashcroft v. Free Speech Coalition*, 535 U.S. ___, 122 S. Ct. 1389, 1404 (2002) ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful."); *Florida Star v. B.J.F.*, 491 U.S. 524, 535-36 (1989) (condemning "timidity and self-censorship" that would be caused by "onerous obligation" of sifting materials "to prune out material arguably unlawful for publication") (citation omitted); *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965) (law causing chilling effect is unconstitutional even if defendant is likely to win in the end); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (chilling effect of indefinite prohibitions induces conscientious people to limit themselves to that which is "unquestionably safe").[12]

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[12] Particularly relevant for the types of uses that artists and scholars are likely to make is the copyright principle that the value of the material the copier added to the infringing work is not a defense. *See, e.g., Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992). Thus, unlike the situation with regard to obscenity or libel, where a work is evaluated as a whole, even a small amount of copying can cause a work to be infringing. This increases the burden copyright imposes on lawful speech. *Cf., e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–17 (1991) (holding that First Amendment requires libel law to overlook minor inaccuracies and demands analysis of challenged article as a whole); *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that First Amendment only allows work to be found obscene if, taken as whole, it lacks serious literary, artistic, political or scientific value). The requirement to scrutinize every instance of copying, however limited, magnifies the likelihood of self-censorship by making it more difficult for publishers to determine what is permitted.

The First Amendment recognizes that the risk of self-censorship is more or less tolerable depending on the nature of the interest at stake. For example, the governmental interest in protecting the reputations of private individuals who are not involved in matters of public concern justifies a lower standard for libel than that applicable to public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Although the greater ease of proving libel creates a greater risk of self-censorship of reporting on private individuals than of reporting on public figures, reporting on public figures is justifiably deemed more important. Similarly, the incentive effects of an initial grant of copyright are seen as so pronounced that some self-censorship can be tolerated. As the copyright term increases (bringing declining marginal value to a declining number of works), the costs to speech – particularly for creators, researchers and teachers – far outweigh the benefits.

By definition, the costs of self-censorship often are unknowable. Sometimes, however, the cost is evident. As recounted above, the authors of "Who Built America?" censored their offerings of works in the 1920s and 1930s, forsaking materials that could have, and should have, been part of their history because the publisher refused to rely on fair use. As a result, the federal government's role in the period is overemphasized. This kind of distortion, effected by government regulation but invisible to the public, underlies the First Amendment's concern for self-censorship. The students who look to "Who Built America?" are deprived of the fullness of history. Although copyright in

theory regulates only expression, not ideas, the practical effect of extending the term of older copyrights is to distort speakers' messages.[13]

II. These Harms Are Unjustified Under the Intermediate Scrutiny Test of *Turner*.

A. *Turner* Sets Forth the Appropriate Standard for Evaluating the CTEA.

Copyright restricts some speech in order to promote other speech, expressed in the Constitution as Congress's power to "promote the progress of Science and the Useful Arts." U.S. Const. art. 1 § 8. Copyright law is subject to the First Amendment, however, because its censorial effects could – and do, in this case – substantially outweigh its speech-promoting effects, if any.[14]

The *Turner* cases, which involved content-neutral regulations that suppressed some speech in order to help other kinds of speech, establish the analytic framework for determining whether retrospective extension of the

[13] *Cf. Meyer v. Grant*, 486 U.S. 414, 424 (1988) (First Amendment protects individuals' right "not only to advocate their cause but also to select what they believe to be the most effective means for so doing"); *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

[14] Copyright law could not, for example, constitutionally prohibit the use of ideas, as distinct from expression. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). Copyright scholars have long recognized that First Amendment principles help define the proper limits of copyright. *See, e.g.*, Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1193-96 (1970) (discussing limited term); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970). Whether or not Congress is entitled to any presumption of constitutionality with respect to prospective expansions of the rights or term of copyright, retrospective effects must be examined carefully inasmuch as they inevitably suppress speech without any obvious countervailing incentive for creating works that will be available to the public. In this way, the copyright balance – which promotes the public interest in creation of and access to expression – is skewed sharply against core First Amendment rights.

copyright term violates the First Amendment.[15] In the *Turner* cases, the Court applied intermediate scrutiny, upholding restrictions on speech only after a detailed record had been developed showing that Congress legitimately could have concluded that must-carry regulation of cable providers was necessary to the survival of free broadcast television, and that must-carry contributed to widespread dissemination of information from a multiplicity of sources and preserved fair competition. *Turner II*, 520 U.S. at 189. To guard against the unwarranted suppression of speech, the Court required Congress to show with "substantial evidence" that the harm it is addressing is "real, not merely conjectural," and that regulation would alleviate the identified harm "in a direct and material way" without burdening substantially more speech than necessary. *Turner I*, 512 U.S. at 664-66.

Whether this test is satisfied depends on the facts of each case: "[T]he mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation" from First Amendment scrutiny. *Id.* at 640. Furthermore, "[t]hat the Government's asserted interests are important in the abstract does not mean ... that the ... rules will in fact advance those interests." *Id.* at 664.

To satisfy *Turner*, Congress must reasonably have concluded that retrospective term extension furthers "an important or substantial" interest, and that the resulting restriction on speech is no greater than essential. *Id.* at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). As to the first of these requirements, the CTEA promotes only the economic interests of the owners of copyright in the very few older works that remain valuable today. As

[15] The analysis set forth in the *Turner* cases has been applied to content-neutral speech regulations beyond the must-carry rules. *See, e.g., United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999) (applying *Turner* to statute regulating harassing phone calls); *BellSouth Corp. v. Federal Communic. Comm'n*, 144 F.3d 58 (D.C. Cir. 1998) (applying *Turner* to regulation of "electronic publishing" such as disseminating news articles and providing database services).

demonstrated below, this is hardly a substantial interest. As to the second, the CTEA's speech-suppressing effects are far broader than needed to advance the government's purported interests. Retrospective term extension has a vast scope, making its cost to free expression higher and less predictable than were the costs to the limited class of speech at issue in the *Turner* cases. In addition, retrospective term extension cannot be justified by standard incentive theory, which can support prospective increases in copyright rights. Because Congress failed to meet the *Turner* standard of intermediate scrutiny, the judgment below should be reversed.[16]

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[16] Some have argued that, for Petitioners to prevail, all prior term extensions must be deemed unconstitutional, but that claim is mistaken. *Turner* analysis is, by its nature, fact-specific. No class of speech regulations gets an automatic pass or an automatic rejection. The CTEA's retrospective term extension is no exception; invalidating it on its own merits need not affect previous extensions.

First, the CTEA comes at a time where older material is more readily accessible than ever before, where digital preservation is widely available and where dissemination of these works to broad and niche markets alike has never been easier, whether via the Internet or otherwise. Thus, there are many speakers whose speech has been suppressed by the CTEA. There is no reason to assume that past extensions to lesser durations (for example, from 28 to 56 years from publication) had the same speech-inhibiting effects, given the technology of the time and the greater ability to trace ownership over shorter time periods.

Second, the penultimate term extension, in 1976 – the only one still relevant – was part of a comprehensive reform of copyright law decades in the making. This revision, as a whole, substantially increased the incentives to create new works. It also removed the negative effects of formalities such as copyright notice and difficulties with transferring rights that had formerly been traps for the unwary. *Cf. New York Times Co. v. Tasini*, 533 U.S. 483, 494-95 (2001). As part of that larger balance, the extended terms of the 1976 Copyright Act present a very different case.

Finally, First Amendment doctrine itself has been greatly clarified during the latter half of the twentieth century. Ever-expanding copyright laws that go far beyond the initial protections afforded to authors of the Founding era now have evident disruptive effects on the freedom of speech. Because *Turner* analysis looks to the facts of the current situation rather than relying on conceptual categories, it provides a way to evaluate the three justifications offered for the retrospective term extension and the harm it causes in the real world. *See* Section II.B, *infra*.

B. Retrospective Term Extension Does Not Serve a Substantial Governmental Interest.

Based on the legislative record before Congress, there were three possible justifications for retrospective term extension: (1) preservation of older materials; (2) economic benefit to copyright owners who, as owners, might use revenues from term extension to invest in more production; and (3) the need to harmonize the term of copyright with the newly extended European term of copyright.[17] None suffices, in large part because there simply was no evidence to back them up, as *Turner* requires.

1. Retrospective Term Extension Does Not Promote Preservation.

Congress justified retrospective term extension on the ground that it would not be worth the expense for copyright owners to preserve old motion pictures if they entered the public domain. Congress lacked any evidence, however, that any number of older works had sufficient present value that twenty more years of copyright would tip the economic balance in favor of preservation.[18]

In fact, the only specific evidence came from independent archives that own copies of works and were preserving public domain works. *See, e.g., 1995 Hearing, supra*, at 154 (statement of Larry Urbanski, Chairman, American Film Heritage Ass'n) ("Films from the 1920's could contain as much as 75 percent of motion picture works no longer owned by anyone, with no traceable lineage, called Orphan works.... [that] ... will be abandoned because public

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[17] *See* S. Rep. No. 104-315 (July 10, 1996).

[18] *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden ...."); *Turner I*, 512 U.S. at 664 (Congress must do more than "simply 'posit the existence of the disease sought to be cured'") (citation omitted); *Time Warner Entertainment Co. v. Federal Communic. Comm'n*, 240 F.3d 1126, 1132 (D.C. Cir. 2001) (if substantial evidence justifying speech restriction existed, "one would expect the [Congress] to be able to point to examples").

domain allowed the economic incentive to preserve them."); *id.* at 160-61 (statement of John Belton, Society for Cinema Studies) (listing public domain works preserved by non-copyright owners and explaining that, of surviving older films, only a small percentage have commercial value).[19]

When it came to preservation, Congress failed to make "reasonable inferences based on substantial evidence" that retrospective term extension was justified. *Id.* at 666.

2. Congress Had No Evidence That Retrospective Term Extension Operates as an Incentive to Create New Speech.

Copyright owners asserted to Congress that preserving their copyright monopoly for an additional twenty years would give them more money to invest in producing more works, encouraging widespread availability of diverse types of speech. This argument fails on the lack of evidence and, indeed, on the basis of logic and common experience.

Congress made no findings that the motion picture, software or any other content industry was in danger. To the contrary, as every witness emphasized, the United States copyright industries are the most successful and influential in the world. No one testified that the economic returns from exploiting the few older works that still have value for twenty more years would make a noticeable difference in

[19] The problems with reserving to copyright owners the sole right to preserve are not limited to motion pictures. The 1911 edition of the *Encyclopaedia Britannica*, for example, which "broke new ground by having experts in each field prepare its articles" and is currently of historical interest, is available on-line only through the efforts of Byron Reese, who scanned the 29 volumes using customized software over two years, at a cost of $200,000, because of his personal interest in it. Pamela LiCalzi O'Connell, *Online Diary*, N.Y. TIMES, Apr. 11, 2002. Encyclopaedia Britannica itself does not make older editions available because there is no commercial market for them. *Id.* (quoting spokesman's statement that "When it comes to creating products that people will actually buy, we find that up-to-date information is what they want.").

investment.[20] There is no substantial governmental interest sufficient to survive intermediate scrutiny in marginally improving the condition of a few members of a thriving industry.[21] The Court has never recognized a similar interest in subsidizing a particular class of private persons as a justification for speech regulations, and to do so here would make the concept of substantial interest meaningless.

Copyright owners justified this subsidy by asserting that works in the public domain are in the dustbin of history, of no benefit to the public because no one has a proprietary interest in them. *See, e.g., 1995 Hearing, supra*, at 41 (statement of Jack Valenti, President, Motion Picture Ass'n of America). ("[P]ublic domain means nobody really cares because nobody owns it."). The First Amendment, however, teaches that speech is not just an investment vehicle: People have reasons to speak beyond maximizing their wealth and their speech has value beyond the economic value to the owner. Likewise, copyright law itself recognizes that the public domain contains the accumulated knowledge of the ages and is a vital source of inspiration for new works.

The denigration of the public domain also ignores basic economic principles that competition to produce goods drives prices down and encourages quality improvements such as, in this case, new illustrations or critical commentary. *See Nixon*, 528 U.S. at 391, 394 ("more

[20] The proponents asserted that new technology enables many works to retain value longer than they used to, but that is no substitute for evidence of value at term's end. If new technology increases the average work's lifetime from five to fifteen years, term extension is still useless to most copyright owners. The focus on computer software highlights the dubious reasoning employed to justify term extension. *See, e.g.*, S. Rep. No. 104-315 (July 10, 1996) (stating that foreign application of extended term was particularly important because 70% of software worldwide is American-produced). Software has a shelf-life of a few years, not nearly a hundred years. It is vanishingly unlikely that software copyright owners could ever benefit from term extension.

[21] *See Turner I*, 512 U.S. at 667 (speech suppression unjustified absent evidence of broadcasters' "serious risk of financial difficulty").

extensive evidentiary documentation" is required where justification for regulation is novel or implausible). The record contains no assessment of the productivity of public domain publishers versus copyright owners of works of the same or similar vintage.[22] As Senator Hank Brown pointed out, the year after Willa Cather's *My Antonia* went into the public domain, seven new editions appeared with widely varying prices, and literary critics agree that this is a recurring pattern. *See* Minority Views of Sen. Brown, S. Rep. No. 104-315 (July 10, 1996); John Sutherland, *The Great Copyright Disaster*, LONDON REV. OF BOOKS, Jan. 12, 1995, at 3 ("[G]ood editions of great works coincide with the end of copyright protection.") (quoted in *1995 Hearing*, *supra*, at 76 (statement of Peter Jaszi, Professor of Law, Washington College of Law, The American University [hereinafter Jaszi]).[23]

Regardless of the CTEA, copyright law encourages copyright owners to add value to works in the public domain. The author of any work lawfully derived from another work obtains a copyright in the original elements of the new work. For example, a new film of *Hamlet* or *The Age of Innocence* will be protected by copyright. Thus, extending the term of copyright protection for the original is entirely unnecessary to provide the former copyright owner,

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[22] Owners of recent works are more likely to make money simply because recent works are on average much more popular.

[23] Professor Jaszi further explained:

> [A] visit to any large bookstore quickly reveals that publishers do compete to offer new editions of popular public domain works – from Sherlock Holmes stories to children's classics like "The Velveteen Rabbit" – often competing as well to include "value added" (such as new introductions, notes or illustrations) which will distinguish particular reprint editions and permit the assertion of copyright in them as "derivative works." The most vivid instance of this last phenomenon is that of Shakespeare's works, with literally dozens of editions available in print, catering to the preferences of every consumer group, from the ultra-scholarly to the price-conscious.

1995 Hearing, *supra*, at 73 (Jaszi).

or anyone else, an incentive to create a new work. *See id.* at 72 (Jaszi); *id.* at 82 n.5 (Karjala *House Statement*).[24] As a result, there is no substantial government interest in subsidizing this particular type of speaker, nor any evidence that the "subsidy" would actually produce new speech.

The Register of Copyrights' evaluation of the evidence before Congress, based on the Copyright Office's extended study of the issue, could not be clearer:

> One must also factor in what will be the cost of extending the term in the United States since this is the largest market for U.S. works. Unfortunately, there are *no meaningful statistics* to assist in determining the cost of extending the term and the benefits to be gained. Thus, *on a pure economic analysis, at this point it would be difficult to support* [term extension].

Id. at 22 (Peters) (emphasis added); *see also id.* at 79, 80-81 (Karjala *House Statement*) (stressing absence of empirical data and contrary evidence).

3. Harmonization of Copyright Terms With the European Union Serves No Substantial Interest.

The CTEA extended the term in the United States to match the European Union's term of life of the author plus seventy years,[25] although many other nations retain shorter terms. As Petitioners' Brief explains in detail, the extension of copyright term neither constitutes "harmonization" in the

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[24] One might argue (though no one did) that competing works based on public domain originals would harm former copyright owners. This is no "harm" at all: It is the marketplace of ideas in action. A more attractive or better-annotated edition of a public domain work enhances speech overall. In any event, Congress had no evidence on this point. Disney's *Beauty and the Beast* and Cocteau's *Beauty and the Beast* derive from the same tale, but it would be hard to call them substitutes. *Cf. Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1274-75 (11th Cir. 2001) (finding no evidence that unauthorized derivative work based on *Gone With the Wind* would harm market for authorized derivative works).

[25] *See* Council Directive 93/98, 1993 O.J. (L 290).

sense of conforming to a normative international copyright term, nor furthers any consistent policy of letting other countries dictate United States copyright law.[26] Imitation for imitation's sake is not a substantial governmental interest, especially because our Nation's copyright law must conform to our cherished constitutional principles of free expression.

"Harmonization" is simply a reiteration of the interest in transferring more (foreign) money to owners of a few successful older copyrighted works, as the congressional findings made clear.[27] This is like no type of substantial interest ever recognized by the Court. It is also a far cry from improving the balance of trade. The overwhelming majority of United States and foreign works in circulation, here and overseas, are recent works. There is no reason to think this will change over time. Congress therefore lacked any evidence that works near the end of their term produce any significant portion of international royalties. *See* Minority Views of Sen. Kohl, S. Rep. No. 104-315 (July 10, 1996); *1995 Hearing*, *supra*, at 148 (Karjala). In fact, the only testimony on point was that extending the term for older United States works, created when Europe – and not

[26] Congress was well aware that United States law, including provisions enacted concurrently with retrospective term extension, deviated from international copyright norms. *See, e.g., Hearing on Music Licensing in Restaurants and Retail and Other Establishments Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. 44-45 (July 17, 1997) (statement of Bruce Lehman, Assistant Comm'r of Patents and Trademarks [hereinafter Lehman]) (discussing conflict between international law and performance rights exception for small businesses); *Copyright Hearings on Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. 110 (June 27, 1997) (statement of Jerome Reichman, Professor, Vanderbilt School of Law) (discussing divergence between CTEA and European law).

[27] *See, e.g.*, S. Rep. No. 104-315 (July 10, 1996) (harmonization will "ensure the greatest possible exploitation of the commercial value of these works in world markets for the benefit of U.S. copyright owners").

the United States – was the leading exporter of content, may actually lead to a net transfer of royalties from the United States to Europe. *See id.* at 88 (Karjala *House Statement*).

C. Retrospective Term Extension Fails the *Turner* Test Because It Is Not Narrowly Tailored to Congress's Goals.

The CTEA extends the copyright term across the board, though far less restrictive alternatives exist. For the many works with no present economic value, retrospective term extension provides no benefit. An across-the-board term extension unnecessarily blocks would-be speakers from using those works. By definition, it is substantially broader than necessary.[28]

All of Congress's asserted aims could have been accomplished by inhibiting a much smaller amount of speech: Congress could have enacted an extension that only applied to works that still had economic value to the creators. Creators who were still interested in exploiting such works could simply file a notice with the Register of Copyrights in a database that could be searched by anyone. Otherwise, works would pass into the public domain. This

[28] The CTEA did add a new section, 17 U.S.C. § 108(h), which provides an extremely limited exception for nonprofit libraries and archives to reproduce, distribute, display or perform a work in the last 20 years of its term under certain circumstances, including "reasonable investigation" into the work's commercial availability.

Most significantly, section 108(h)(3) expressly provides that the new exception does not apply to any subsequent users, including artists wishing to incorporate an image into a new work and scholars wishing to reproduce images in furtherance of their arguments. The exception does not in any way mitigate the harms to the speech of the people for whom archives and libraries exist. Like a regulation requiring speakers to speak in a parking lot and not in the town square, section 108(h) purports to protect speech rights while making them hard to exercise.

In addition, VRA and CCUMC members who are archivists of slides, photographs, film, video, digital images and other media have an impossible task in "reasonable investigation." There are no equivalents to Books in Print, or any other reliable sources, setting forth the availability of images and motion pictures scattered throughout the nation.

regime would emulate the notification provisions already in place for the Uruguay Round Agreements Act's restoration of copyright, 17 U.S.C. § 104A(e) (1994), which require copyright owners to give notice, either publicly or directly to affected parties, in order to cut off others' use of certain foreign works that had fallen into the public domain in the United States. It would also track 17 U.S.C. § 108(h)(2)(c), added by the CTEA as a partial exemption for libraries and archives, which allows copyright owners to provide notice in order to make the exemption inapplicable.

This type of opt-in regime, now established in discrete sections of the copyright law, would allow copyright owners to assert rights under the Copyright Act based on the economic calculation that a particular work's copyright was still valuable. It would preclude any suppression of speech based on untraceable works or works whose present value is historical and cultural.[29] The availability of this alternative demonstrates that the CTEA's retrospective term extension is not narrowly tailored to the interests sought to be protected. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 n.* (1991) ("A regulation is not 'narrowly tailored' ... where, as here 'a substantial portion of the burden on speech does not serve to advance [Congress's] goals.'") (citation omitted); *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989) ("the essence of narrow tailoring" is "focus[ing] on the source of evils the [Government] seeks to eliminate ... and eliminat[ing] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils").[30]

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[29] It would not avoid problems associated with artists' and scholars' inabilities to make use of works as to which notice was given, but it would at least somewhat contain the damage.

[30] As to significant classes of works, moreover, retrospective term extension is not at all tailored to advance the purported interest in harmonization. The United States term for sound recordings, for example, was already longer than the European term before the CTEA. *See 1995 Hearing*, *supra*, at 25 (Lehman).

CONCLUSION

Retrospective term extension suppresses and distorts many speakers' messages, whether artistic, scholarly or pedagogical, inhibits the creation of new works based on old ones and deprives the public of access to older works of historical and cultural interest. No justification offered by Congress is based on substantial evidence, nor outweighs these very palpable harms.

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES, AMERICAN HISTORICAL ASSOCIATION, AMERICAN LIBRARY ASSOCIATION, ART LIBRARIES SOCIETY OF NORTH AMERICA, ASSOCIATION FOR RECORDED SOUND COLLECTIONS, ASSOCIATION OF RESEARCH LIBRARIES, COUNCIL ON LIBRARY AND INFORMATION RESOURCES, INTERNATIONAL ASSOCIATION OF JAZZ RECORD COLLECTORS, MEDICAL LIBRARY ASSOCIATION, MIDWEST ARCHIVES CONFERENCE, MUSIC LIBRARY ASSOCIATION, NATIONAL COUNCIL ON PUBLIC HISTORY, SOCIETY FOR AMERICAN MUSIC, SOCIETY OF AMERICAN ARCHIVISTS, AND SPECIAL LIBRARIES ASSOCIATION IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE* [1]

This brief *amici curiae* in support of Petitioners is submitted by the entities listed below ("*Amici*") pursuant to Rule 37 of the Rules of this Court. *Amici* urge that the Court reverse the judgment of the U.S. Court of Appeals for the D.C. Circuit.

The **American Association of Law Libraries** is a nonprofit educational organization with over 5,000 members who respond to the legal information needs of legislators, judges, and other public officials at all levels of government, corporations and small businesses, law professors and students, attorneys, and members of the general public.

The **American Historical Association** is a nonprofit organization of approximately 15,000 members. It promotes historical studies, the collection and preservation of historical documents and artifacts, and dissemination of historical research.

The **American Library Association** is a nonprofit educational organization of approximately 64,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries.

The **Art Libraries Society of North America** is a nonprofit organization of approximately 1,500 individual and institutional members including architecture and art librarians, visual resources professionals, artists, curators, educators, publishers, and others interested in advancing education, information, and scholarly communication in the arts.

The **Association for Recorded Sound Collections** is a nonprofit scholarly organization of approximately 1000 individuals and institutional members and promotes the preservation and study of historic recordings in all fields of music and speech.

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1. Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, made a monetary contribution to the preparation or submission of this brief.

The **Association of Research Libraries** is a nonprofit association of 123 research libraries in North America. Its members include university libraries, public libraries, government and national libraries whose mission is to influence the future of research libraries in the process of scholarly communication.

The **Council on Library and Information Resources** is a nonprofit organization working to expand access to information, however recorded and preserved, as a public good with special attention now being paid to preservation of non-book formats and digital information.

The **International Association of Jazz Record Collectors** is a non-profit corporation of approximately 1500 members. Its goals include maintaining an association of collectors of jazz recordings, and promoting collecting and research in the field.

The **Medical Library Association** is an educational organization of more than 1,000 institutions and 3,800 individual members in the health sciences information field.

The **Midwest Archives Conference** is the nation's largest regional archival organization, with over 1000 members from corporate, government, church, and university archives, historical societies and other manuscripts repositories and special collections.

The **Music Library Association** is the professional organization in the United States devoted to music librarianship and to all aspects of music materials in libraries.

The **National Council on Public History** is a professional organization of approximately 1700 historians engaged in work outside of academia, and those within academia who prepare students for careers in government agencies, museums, libraries, historic preservation and private businesses.

The **Society for American Music** is a nonprofit scholarly and educational organization of approximately 900 individual and 120 institutional members. It seeks to stimulate the appreciation, performance, creation and study of American music.

The **Society of American Archivists** represents more than 3,000 individuals and 400 institutions and is the authoritative voice in the United States on issues that affect the identification, preservation, and use of historical records.

The **Special Libraries Association** is an international professional association serving more than 14,000 members of the information profession, including special librarians, information managers, brokers and consultants.

Amici are organizations who support the creation of new creative works and promote the advancement of knowledge by preserving cultural heritage, providing educational materials, sponsoring research, digitizing materials, teaching our nation's youth, lending books and other works, creating and using works, and facilitating better technologically-adapted schools.

SUMMARY OF ARGUMENT

A fundamental part of the genius of the United States copyright system is that the Constitution ensures that after the original, creative works of authors have been rewarded with a limited term of protection, those works become part of the public domain to be freely used by all. In enacting the Copyright Term Extension Act ("CTEA"),[2] Congress, *inter alia*, retrospectively enlarged the copyright terms of existing works by twenty years, and prospectively added twenty years of copyright protection to future works. This Act exceeds Congress's authority under Article I, Section 8, Clause 8 of the Constitution (the "Copyright Clause") and materially impoverishes the public domain that the clause was designed to enrich.

In its retrospective application in particular, CTEA gratuitously confers private gains on owners of copyrights in older works, imposes substantial, unexamined burdens on the public at large, and delays by decades the entry of substantial numbers of works into the public domain. CTEA effectively prohibits non-copyright owners — like librarians, curators, archivists, historians, and scholars — from republishing and

2. Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

disseminating older works that may have no significant commercial value, but may be of strong historical or artistic interest. This, in turn, deters and complicates their efforts to preserve such works. For those who want to republish or use such works, CTEA needlessly imposes high transaction costs of seeking out (often unsuccessfully) the rights holders to older works, licensing fees (if they are found) and restrictions on use. CTEA also inhibits scholars, authors and artists from creating and disseminating new works that incorporate works with extended terms. The public ultimately pays for these harms by restricted and/or more expensive access to older works, and by inhibitions on scholarship, teaching, and the creation of new works.

In its ruling below, the D.C. Circuit failed to enforce the limitations on congressional authority specifically set forth in the Copyright Clause and recognized in this Court's precedents.[3] The D.C. Circuit's analysis construes the Copyright Clause language, "[t]o promote the Progress of Science and useful Arts," in a manner that deprives it of substantive meaning. The court thereby failed to recognize a fundamental limitation on this grant of power to Congress. Copyright protection is intended to reward authors in exchange for a benefit to the public. An author's creative, original expression is a precondition of any grant of exclusive rights in a work. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 347 (1991) ("*Feist*"). It follows that Congress cannot "enlarge" protection under this clause without some addition of original creative authorship. *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966) ("*Graham*"). CTEA's retrospective application in particular requires nothing from copyright owners in exchange for its enlarged term of protection.

3. *Eldred v. Reno*, 239 F.3d 372, *reh'g denied*, 255 F.3d 849 (D.C. Cir. 2001). The D.C. Circuit also held that CTEA is not subject to challenge under the First Amendment. 239 F.3d at 376. *Amici* believe that this decision was also in error, but the instant brief will focus on the issue of the scope of Congress's authority under the Copyright Clause.

As an independent constitutional requirement, no term of protection may exceed the "limited" times necessary "to promote" the progress of science and useful arts. *Amici* believe that there must be a "congruence and proportionality" between the "limited" time of copyright protection and the need for such protection "to promote" the progress of science and useful arts. *See, e.g., Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 640, 647 (1999) ("*Florida Prepaid*"). Congress did not undertake the careful balancing necessary to demonstrate such "congruence and proportionality" for CTEA. Congress did not meaningfully address the substantial burdens CTEA places upon the public's access to and use of copyrighted works that would otherwise have entered the public domain. Rather, Congress gave undue weight to purported benefits from CTEA that are largely illusory. For example, CTEA is claimed to promote preservation and restoration of works by providing financial incentives to copyright owners. *See, e.g.*, S. Rep. No. 315, 104th Cong., 2d Sess. 13 (1996) ("Sen. Rep."). This justification for CTEA rests on a number of unexamined and largely erroneous assumptions. Moreover, the narrow "harmonization" CTEA achieves with European Union counties is both a dubious goal as a legal matter and overstated as a factual matter. Finally, CTEA's limited exemption for libraries and archives to enable them to reproduce, distribute, display, or perform works in the last twenty years of the extended term for research and preservation purposes, *see* 17 U.S.C. § 108(h), does little to mitigate CTEA's substantial burdens.

ARGUMENT

Article I, Section 8, Clause 8 of the Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In failing to give proper effect to all the words of this text, the U.S. Court of Appeals for the D.C. Circuit allowed to stand a congressional enactment that clearly exceeds this qualified grant.

I. Copyright Term Enlargements Must "Promote The Progress Of Science And Useful Arts" And Require New Original Expression From The Copyright Owner

The D.C. Circuit's first analytical error was to construe the Copyright Clause in a manner that deprives some of its specific language of substantive meaning. The court below repeatedly characterizes the language, "To promote the Progress of Science and useful Arts," as the "preamble" to the Copyright Clause. *Eldred v. Reno*, 239 F.3d 372, 378, *reh'g denied*, 255 F.3d 849 (D.C. Cir. 2001). Following its precedent in *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981), the D.C. Circuit held that this text does not limit congressional power. *Eldred v. Reno*, 239 F.3d at 377-78. Notwithstanding the D.C. Circuit's characterization, the Copyright Clause does not contain a "preamble."[4]

In *Graham*, this Court stated in the context of a patent case that "[t]he clause is both a grant of power and a limitation." 383 U.S. at 5. Further, "[t]he Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose." *Id.* at 5-6.[5] This Court's jurisprudence demands that all the words comprising the Copyright Clause be given effect. For the D.C. Circuit to diminish a portion of the Constitution's language as an inconsequential "preamble" stands on its head this Court's characterization of this same text as a "constitutional command." *Id.* at 6. The copyright laws, like the patent laws, "by constitutional command" must promote the progress of science and useful arts. *Id.* "This is the *standard* expressed in the Constitution and it may not be ignored." *Id.* (emphasis in original). In reviewing the constitutionality of CTEA, the

4. *See id.* at 382 (Sentelle, J., dissenting) (erroneous to style "the granting clause of the sentence as merely introductory when in fact it is the definition of the power bestowed by that clause").

5. *See also Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000) (same language that serves as basis for affirmative grant of congressional power to enforce Fourteenth Amendment also serves to limit that power).

D.C. Circuit, like Congress in enacting the legislation, has nevertheless disregarded that standard.

This fundamentally flawed legal foundation led the D.C. Circuit to erroneous conclusions about the constitutionality of the Act. As this Court also stated in *Graham*, Congress may not "*enlarge* the patent monopoly without regard to the innovation, advancement or social benefit gained thereby." *Id.* at 6 (emphasis added). This principle recognizes that any "enlarge[ment]" of the "patent monopoly" requires some level of constitutionally cognizable innovation: innovation is a precondition of an initial grant or any enlargement of the duration or scope of patent protection. *Id.*

In the case of copyright, also, there is a precondition of any "enlarge[ment]" of the term of protection, and that is originality. This Court has held that the originality requirement is constitutionally mandated for all works. *Feist*, 499 U.S. at 347 (citations omitted). Copyright protection "is intended *to motivate the creative activity* of authors . . . by the provision of special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added). *See also Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 546 (1985) (copyright monopoly grant to induce creation of new material). In the words of a principal author of the Copyright Clause, copyright protection should be "considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use."[6]

The D.C. Circuit's position below is at odds with this Court's articulation of the aims of the Copyright Clause.

6. James Madison, Detached Memoranda, *in* James Madison: Writings 756 (Jack N. Rakove ed., 1999). *Accord Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989) (patent laws are "carefully crafted bargain for encouraging the creation and disclosure of new, useful and nonobvious advances in return for the exclusive right to practice the invention for a period of years").

The D.C. Circuit held that without any additional showing of original, creative activity by an author, a copyright may by statute be continued in force beyond the renewal term specified by law when the copyright was first granted. *Eldred v. Reno*, 239 F.3d at 377. Yet the enlargement of existing copyright terms under CTEA cannot reasonably be construed as motivating the creative activity of or requiring anything in exchange from authors to obtain the added grant of protection.[7] Indeed, motivation is logically impossible in the context of granting protection to existing works. *Eldred v. Ashcroft*, 255 F.3d 849, 855 (D.C. Cir. 2001) (Sentelle, J., dissenting from denial of rehearing en banc).[8] In its retrospective application in particular, CTEA deprives the public of a substantial part of the benefit of its original bargain with authors and exacts nothing in return as a condition of the additional protection. With CTEA, Congress has not rewarded an author in exchange for "the fruits of [the author's] intellectual labor." *Trade-Mark Cases*, 100 U.S. 82, 94 (1879). Rather, Congress has conferred a windfall of income principally upon the heirs and corporate successors-in-interest of authors, in exchange for no direct social benefit.[9]

7. It is insufficient to say that the originality justifying the initial grant of copyright justifies enlargement of the copyright at the end of its "limited" term. *See, e.g., Eldred v. Reno*, 239 F.3d at 377. Originality is a precondition of the grant of the original term. *Feist*, 499 U.S. at 347. Even were the claim of "progress" to be justified by new sales, circulation, preservation, or other activity to enhance public access to a work, CTEA does not *require* such activity as a precondition of the enlarged grant. Thus, the enlarged grant of protection is gratuitous and not in exchange for any defined public benefit.

8. *See also* Edward Rappaport, Copyright Term Extension: Estimating the Economic Values 4 (Cong. Research Service Rep. No. 144, 1998) (extension has basically no effect on creation because these works already exist).

9. "In effect, we are taking 20 years of wealth-generation and transferring it to a small group of people — often corporate owners that did not create the works in the first place. The public is significantly harmed by that transfer of wealth." Sen. Rep. at 36 (Minority Views of Sen. Brown); *id.* at 34-35 (CTEA has the effect of diverting money from

(Cont'd)

The consequence is that "the public [will] continually be required to pay tribute to would-be monopolists without need or justification." *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969).

The D.C. Circuit rejected the idea that the Copyright Clause requires some *quid pro quo* flowing from authors to the public in exchange for any enlarged term of copyright protection. *Eldred v. Reno*, 239 F.3d at 376-77. The Court of Appeals endorsed the notion that Congress has previously granted federal protection to works that were already in existence or already published. *Id.* at 377. Most notably, the D.C. Circuit cites the Copyright Act of 1790,[10] enacted by the first Congress after the Constitution was adopted, because that act protected works that were already in print. The D.C. Circuit held that this Copyright Act of 1790 is "almost conclusive" on the point that Congress can extend copyright protection for works that were already created, published and under copyright protection. 239 F.3d at 379. *Amici* believe this argument to be inapposite.

In 1790, Congress brought previously published works within the ambit of its first copyright legislation.[11] When it did so, it conferred a benefit upon authors — who had not *previously*

(Cont'd)
education programs and leads to higher consumer prices by creating unnatural scarcity of works); *id.* at 38 (Minority Views of Sen. Kohl) (windfall income to copyright owners at expense of consumers). *See also* Paul J. Heald & Susanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, U. Ill. L. Rev. 1119, 1170, 1174-75 (2000) ("Heald & Sherry") (CTEA's retrospective application is a "legislative gift" of public funds; amounts to subsidy to copyright owners with no political accountability).

10. "An Act for the encouragement of learning," § 1, 1 Stat. 124 (1790) ("Copyright Act of 1790"), *reprinted in* 8 Melville B. Nimmer & David Nimmer, Nimmer On Copyright App. 7, at 41 (2002) ("Nimmer On Copyright")

11. The Copyright Act of 1790 covered "any map, chart, book or books already printed within these United States," and "any map, chart, book or books already made and composed, but not printed or published, or that shall hereafter be made and composed." § 1, 1 Stat. 124, *reprinted in* 8 Nimmer On Copyright App. 7, at 41.

been rewarded with federal copyright protection — a *new* term of federal protection. Prior to the Copyright Act of 1790, authors had received protection pursuant to the various states' pre-constitutional copyright statutes.[12] The Copyright Act of 1790 essentially supplanted this state law protection.[13] It rewarded an author's creativity and original work with a limited term of exclusive federal rights *only once*, and under very specific historical circumstances. This new federal protection for previously published works in 1790 is therefore materially different from the gratuitous protection added to existing federal copyright terms in 1998. *See Eldred v. Reno*, 239 F.3d at 384 (Sentelle, J., dissenting) (Copyright Act of 1790 "did not extend subsisting federal copyrights enacted pursuant to the Constitution").

Similarly, in 1976, when Congress extended new federal protection to works that previously had been created but were unpublished,[14] it was protecting works that *previously* had not been rewarded with federal copyright protection. This reward was conferred *only once* (at least until CTEA). The copyright

12. These statutes are reprinted in 8 Nimmer on Copyright App. 7, at 12-40. *See also* Journal of the United States in Congress Assembled, Containing The Proceedings From Nov. 1782, to Nov. 1793, pp. 256-57 (Philadelphia, D.C. Claypoole, 1783), *reprinted in* 8 Nimmer On Copyright App. 7, at 11 (recommendation of the Continental Congress that states, secure copyrights for "any *new books not hitherto printed*") (emphasis added). *See generally* Francine Crawford, *Pre-Constitutional Copyright Statutes*, 47 J. Copr. Soc'y 167 (2000).

13. *See* The Federalist No. 43 (James Madison), *reprinted in* James Madison: Writings 243 (Jack N. Rakove ed., 1999) (states cannot separately make effectual copyright protection; most "have anticipated the decision of this point, by laws passed at the instance of Congress"). *Cf. Goldstein v. California*, 412 U.S. 546, 557-71 (1973) (states retain concurrent power to afford copyright protection to works of authors as long as such protection does not conflict with federal law).

14. *See* Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (1976), §§ 301-04 (codified as amended at 17 U.S.C. §§ 301-04) (creating single system of federal statutory copyright for published and unpublished works) ("1976 Copyright Act").

owners whose works were covered received this federal protection *in exchange for* their perpetual common law protection. Congress explicitly recognized this at the time: "A statutory term of life-plus-50 years is no more than a fair recompense for the loss of these perpetual rights."[15] Further, the decision to eliminate common law copyright in favor of a uniform federal standard enabled simplification of the process of determining the term of copyright. Congress deemed the confusion prior to 1976 regarding the proper term of a copyright and when or whether a work was "published" to be essential flaws in the system.[16] Thus, the benefit Congress conferred on owners of pre-existing common law protected works in 1976

15. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 135 (1976), *reprinted in* 8 Nimmer On Copyright App. 4, at 134 ("1976 Act House Report").

16. *Id.* at 133. In adopting the extension of the renewal term in 1909, Congress expressly decided *not* to extend initial terms, only renewal terms. H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909), *reprinted in* 8 Nimmer On Copyright App. 13, at 21 ("1909 Act House Report"). Conferring a longer term for renewed works, as opposed to works in their initial terms, Congress understood renewal as a copyright formality and therefore a procedural burden on owners. In 1909 and again in 1976, Congress was advised by the Copyright Office that only a small fraction of the copyrights for published works were actually renewed. *Id.* at 22; 1976 Act House Report at 136; U.S. Copyright Office, Register's Report on the General Revision of the U.S. Copyright Law (1961), *reprinted in* 8 Nimmer On Copyright App. 14, at 51. In short, the renewal process was a self-selecting determination by owners as to the longevity of their works. These extensions for previously published and copyrighted works may not have been consistent with the principles discussed above, but their negative impact was much more modest, more closely tied to actual interest by the copyright owner in exploiting the work, and therefore they were less likely to invite challenge. The series of term extensions enacted prior to the 1976 Act were not free from controversy. Congressman Kastenmeier and others thought them unconstitutional. *See, e.g.*, H.R. Rep. No. 605, 92nd Cong., 2d Sess. (1971), *reprinted in* 8 Nimmer On Copyright App. 8, at 59-60 (extension of existing copyright terms is windfall to copyright owner and retrospective reward for authorship at expense of public domain; does not directly serve constitutional aims) (Rep. Kastenmeier, dissenting).

was explicitly in exchange for a preexisting set of rights. Congress did not obtain such a benefit for the public in 1998 by enacting CTEA.

II. Copyright Term Enlargements Must Satisfy Constitutional Aims And Be Congruent And Proportional To Those Aims

As an independent constitutional requirement, no term of protection may exceed the "limited" times necessary "to promote" the progress of science and useful arts. To determine whether CTEA meets this requirement, the government's justifications for this legislation must be measured against a standard that fully takes into consideration the constitutional aims of the Copyright Clause, including the extent to which CTEA's enlargement of copyright terms retards, rather than promotes, progress.

This Court has stated that "[w]ithin the limits of the constitutional grant [of the Copyright Clause], the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Graham*, 383 U.S. at 6. But the Copyright Clause contains, on its face, specific limits and qualifications that exceed those imposed on other grants of congressional authority under Article I, Section 8. The question of what constitutes an appropriate "constitutional aim" is ultimately a judicial rather than a legislative question. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 270 (1964) (Black, J., concurring); *Florida Prepaid*, 527 U.S. at 635-39.

Moreover, special considerations apply in ascertaining the scope of the constitutional grant and the nature of the constitutional aims of the Copyright Clause. When Congress exercises its authority under the Copyright clause, it creates property interests that are presumably subject to the Takings Clause and may not be divested without due process or just compensation. *Florida Prepaid*, 527 U.S. at 642. Most importantly, this clause is materially different from other grants of congressional power in that it *necessarily* implicates

expressive interests protected under the First Amendment.[17] For example, CTEA's twenty-year term extensions enlarge the duration of the exclusive rights for copyright owners (defined in 17 U.S.C. § 106), and consequently burdens the public's ability to use the expression protected thereby.

In light of the specific limitations set out in the Copyright Clause and special considerations implicated by congressional action thereunder, it would be improper for the courts simply to review congressional action under the Copyright Clause as they "would under any other exercise of power enumerated in Article I." *Eldred v. Reno*, 239 F.3d at 380.[18] This Court's precedents in analogous areas of the law provide guidance as to the proper standard to be applied in reviewing congressional actions enlarging copyright terms. This Court's jurisprudence suggests that when Congress exercises an enumerated power in a manner that burdens another constitutional interest, there must be a "congruence and proportionality" between the scope of the legislation and the objectives to be achieved by it. *See Florida Prepaid*, 527 U.S. at 634-48 (applying "congruence and proportionality" standard to test validity of congressional amendment of patent laws, pursuant to Section 5 of the Fourteenth Amendment, to abrogate States' Eleventh

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17. *See Cohen v. California*, 403 U.S. 15, 26 (1971) (linguistic expression has both emotive and cognitive force; "we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."); *see also San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 536 (1987) (applying intermediate scrutiny under First Amendment to grant of exclusive rights in term "Olympic").

18. *Cf. United States v. Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., and O'Connor, J., concurring) ("The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights.").

Amendment immunity from suits by citizens).[19] In addition, there must be an adequate record to support the rationale.[20]

What this means in the context of the Copyright Clause is that Congress must create a record to establish that there is a congruence and proportionality between the length of copyright terms and the utility of that protection in promoting the progress of science and useful arts. In this case, the D.C. Circuit improperly concluded that Congress examined factors and evidence sufficient to support an enlargement by two decades. *See Eldred v. Reno*, 239 F.3d at 378-79. An adequate record to justify CTEA would necessarily have to include not only examination of the putative benefits to the progress of science and useful arts. It would also have to carefully examine the burdens such protection places on the public, including economic and practical burdens as well as the diminution of the public's ability to access and to use expression during the extended term of protection. Absent such an inquiry by Congress and a record that squarely supports the proposed enlarged term, this Court should not find that the enlargement of copyright protection under CTEA is congruent and proportional with the need to promote the progress of science and useful arts.

This level of justification is particularly needed in the context of repeated extensions of existing copyright terms.

19. *See also City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act of 1993; no proportionality or congruence between means adopted and legitimate end to be achieved).

20. *See Florida Prepaid*, 527 U.S. at 640 ("Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."); *City of Boerne v. Flores*, 521 U.S. at 531 (legislative record contained very little evidence of unconstitutional conduct purportedly targeted by statute's substantive provisions). *Cf. Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 182 (1997) (under First Amendment Congress must make reasoned judgment that "burden imposed" on speakers by content neutral regulation is congruent to legislation's benefits); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 667-68 (1994) (inquiry required into sufficiency of findings on effect of regulation to determine whether regulation narrowly tailored).

As the time of protection becomes progressively less and less limited, Congress should be required to have a progressively greater foundation for determining that enlarged protection is necessary to promote the progress of science and useful arts.[21] Otherwise, the "limited Times" constraint on congressional power is meaningless, allowing Congress to afford perpetual copyright protection "on the installment plan."[22] This type of scrutiny would not require, as some fear, the Court to exceed "judicially manageable limits" on congressional authority to set copyright terms. *See* Br. for Respondent in Opp'n to Pet. for Cert. at 14. Rather, it would simply involve the Court construing, as it always has, the relevant constitutional language, and ensuring that Congress engaged in a sufficient consideration of all factors and evidence necessary to support its determination. As demonstrated by this Court's application of this standard in cases such as *Florida Prepaid*, this level of scrutiny would be judicially manageable and would not impermissibly limit any discretion that Congress has, in fact, been granted.

III. Congress Did Not Adequately Consider The Substantial Burdens CTEA Places On The Public's Access To And Use Of Copyrighted Works During Their Extended Terms

The brief legislative record accompanying CTEA shows that Congress only weighed certain benefits it perceived would

21. The more remote in time the copyright incentive becomes, the less plausible the assertion that it serves to motivate creative activity. *See generally* Robert L. Bard & Lewis Kurlantzick, *Copyright Duration at the Millennium*, 47 J. Copr. Soc'y 13, 22-29 (2000) (costs increase but benefits do not with lengthy terms); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright In Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 323-29 (1970) (same). *See also* Heald & Sherry at 1173-74 (CTEA's prospective application would have no measurable effect in increasing number of works authored); Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 Fla. L. Rev. 989, 1002, 1031 (2000) (same).

22. *Copyright Term Extension Act of 1995: Hearings on S. 483 Before The Senate Judiciary Comm.*, 104th Cong., 1st Sess. (1995) ("Senate Hearings") (statement of Professor Peter Jazsi).

accrue from the Act's broad enlargement of copyright protection. *See, e.g.*, Sen. Rep. at 3-23; H.R. Rep. No. 452, 105th Cong., 2d Sess. 3-9 (1998). Congress did not meaningfully address the substantial burdens this Act places upon the public's access to and use of copyrighted works that would otherwise have gone into the public domain.[23]

Notwithstanding a narrow legislative exception for specified activities of qualifying libraries and archives under 17 U.S.C. § 108(h), *infra* pp. 29-30, the entire structure and history of CTEA evidence a failure to balance these substantial burdens against the limited benefits of the legislation. As noted in the Minority views of Senator Brown, the hearings and debate on CTEA wrongly suggested that the extension would not harm anyone and at the same time neglected to examine the concomitant harm to the public domain.[24] Similarly, Senator Kohl observed that unless Congress pays due consideration to the reasons for limiting copyright terms, it risks damaging the public interest: To respect the Constitution's requirement, Congress must "strike a balance between encouraging creativity and protecting consumers from monopoly power. Like all monopolists, copyright owners are loathe to give up their power. But once the main purpose of copyright has been served and creativity has been adequately encouraged, the monopoly power must bow to the public interest." Sen. Rep. at 38. In enacting

23. *Amici* recognize that Congress did have before it some indications of the problems with and objections to the legislation. For instance, the Register of Copyrights testified that the "negative impacts" of CTEA would include freezing the public domain for twenty years and perpetuating problems with copyright clearances. She acknowledged that determining copyright status and term of some works is difficult and that finding the owners can be "almost impossible." Senate Hearings (statement of Marybeth Peters, Register of Copyrights). However, such limited testimony falls far short of weighing the full scope of these burdens against the perceived benefits of the legislation or devising meaningful ways to address these burdens.

24. Sen. Rep. at 34; *see also id.* at 34-35 (extending copyright term by twenty years upsets constitutional balance and threatens to dry up public domain).

CTEA, Congress did not "adequately balance[ ] these competing interests." *Id.* Moreover, closer examination reveals that the perceived benefits of the legislation are largely illusory or are not directed towards proper aims of copyright protection.

A. CTEA Substantially Burdens Efforts To Preserve Works, Make Them Available To The Public, And Use Them To Create New Works

In the legislative history, it was claimed that CTEA could promote preservation and restoration of works embodied in perishable media. *See, e.g.*, Sen. Rep. at 13. The Senate Report states that "the digital revolution offers a solution to the difficulties of film, video, and audio preservation, and offers exciting possibilities for storage and dissemination of other types of works as well. However, to transfer such works into a digital format costs a great deal of money. . . ." *Id.* The Senate Report also observes that digitized works can be perfectly reproduced at little or no cost. *Id.* It concludes that without copyright protection "there is a tremendous disincentive to investing the huge sums of money necessary to transfer these works to a digital format, absent some assurances of an adequate return on that investment." *Id.*[25]

However, giving copyright owners additional protection to reward restoration and preservation of works was either unnecessary as a practical matter or improper as a constitutional matter. Were the restoration of an existing work to involve any original, creative expression, the additional matter would qualify as a derivative work under the pre-existing terms of the Copyright Act.[26] Thus, there was already a copyright incentive

25. The Court of Appeals believed that CTEA could be found to "promote Progress" by giving owners of copyrights in existing works "an incentive to preserve older works, particularly motion pictures in need of restoration." *Eldred v. Reno*, 239 F.3d at 379 (citing Sen. Rep. at 12).

26. 17 U.S.C. § 103(b) (copyright in derivative work extends only to material contributed by author of such work, as distinguished from preexisting material employed in work; derivative work copyright independent of, and does not enlarge, copyright in preexisting material).

for activities that add original, creative expression to public domain works. And although preservation activities are laudable, they are not copyrightable authorship. By further rewarding owners of copyrights in pre-existing works for possible acts of preservation, Congress is granting copyright protection through the back door for "sweat of the brow" efforts. Contrary to what the D.C. Circuit stated,[27] this is not a legitimate aim of copyright protection. *See Feist*, 499 U.S. at 353-61. Although Congress may fund such preservation activities directly, it may not use its powers under the Copyright Clause to do so.

Experience teaches that copyright owners principally preserve and make accessible only those works they believe have sufficient commercial appeal to merit the expenses associated with such undertakings.[28] Conversely, many institutions and individuals (including those represented by the *Amici*) are willing to invest the sums required to preserve, digitize and facilitate public access to vast amounts of material regardless of its commercial appeal and with little or no assurance of financial return. CTEA will actually deter the preservation of and public access to such materials by keeping them out of the public domain.

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27. "Preserving access to works that would otherwise disappear — not enter the public domain but disappear — 'promotes Progress' as surely as does stimulating the creation of new works." *Eldred v. Reno*, 239 F.3d at 379.

28. *See supra* note 16 (discussing small number of copyright renewals). Tellingly, following this Court's decision in *New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001), some commercial database producers purged thousands of articles by freelance authors rather than attempt to find and procure permission from the authors holding copyrights in individual articles originally published as part of larger collective works. Scott Carlson, *Once Trustworthy Newspaper Databases Have Become Unreliable and Frustrating*, Chronicle of Higher Education, Jan. 25, 2002, at 29.

1. CTEA Harms Public Domain Preservation and Republication Projects

An example of a project that is preserving and making historically significant public domain works available to the public is *Documenting the American South (DAS)*.[29] DAS is an electronic collection comprised of more than 1000 printed publications and manuscripts. Sponsored by the Academic Affairs Library at the University of North Carolina at Chapel Hill, DAS provides no-fee access to these materials via the Internet. These digitized, primary materials offer Southern perspectives on American history and culture, supplying teachers, students, and researchers at every educational level with a wide array of documents. "Currently, *DAS* includes six digitization projects: slave narratives, first-person narratives, Southern literature, Confederate imprints, materials related to the church in the black community, and North Caroliniana." *Id.* The textual materials on DAS were scanned using optical character recognition software, then proofed for completeness and accuracy, cataloged, and archived.[30] It is estimated that the costs of the digitization process exceed $5 per page.[31]

The documents digitized and published through DAS are of tremendous value to scholars and the public at large.[32]

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29. Accessible at http://docsouth.unc.edu (last visited May 17, 2002).

30. *See* http://docsouth.unc.edu/digitizingnarr.html (last visited May 17, 2002). Preservation review is also undertaken for safe handling of the original materials being digitized and for conservation treatments, re-housing, and microfilming, as appropriate. *Id.*

31. Telephone interview with Larry Alford, Deputy University Librarian, University of North Carolina, Chapel Hill (April 29, 2002).

32. Joe A. Hewitt, *Doc South 1000th Title Symposium* (March 1, 2002), *available at* http://docsouth.unc.edu/jahewitt.html (last visited May 17, 2002). The outpouring of praise for this project from readers of these materials has been overwhelming, and clearly attests to its value to the public. The availability of these primary sources in DAS has influenced what graduate students have adopted as research topics, what secondary school teachers can teach, what K-12 students can read, how budding novelists approach their characters and plots, and how readers

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The DAS web site receives approximately 4000-6000 hits per day. *Id.* These are often for sources not readily available elsewhere. For example, DAS includes approximately 160,000 pages of slave narratives. In many instances, there are perhaps only three or four original hard copies extant. Prior to digitization of this material, these type of documents would be accessed by perhaps a half dozen people per year. These unique documents are accessed now by an estimated fifteen to twenty people *per day* (i.e., well over 5000 people per year) via the Internet. Alford Interview, *supra* note 31.

Equally clear is the fact that this project would be nearly impossible to undertake without the public domain. Almost all the documents digitized for DAS are documents dated prior to 1923. *Id.* Although the institution has been able to include a few dozen works from after that date, it has not been able, as a practical matter, to digitize and publish works from the 1920s and 1930s. The high transaction costs associated with identifying and locating current copyright owners presents a major obstacle to digital publication. DAS simply does not have the resources necessary to investigate the copyright status of such works or to obtain clearances when necessary. *Id.* The few instances where the institution has undertaken to digitize and reprint important out-of-print works published after 1923 have largely involved situations where the publisher was affiliated with the institution and the heirs were comparatively easy to find. *Id.* Even in these cases the clearance process consumed approximately a dozen man-hours per work. *Id.*

Similar constraints have been imposed on the efforts of the Library of Congress to digitize and make available to the public substantial portions of its collections. *American Memory*, a gateway site to rich primary source materials relating to the

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from all walks of life experience history. *Id.* "Reenactors and confederate heritage groups have found just as much to praise as African-American historians and civil rights activists. Somehow, the primary sources in *Doc South* seem to help people from different backgrounds to find their way back to a common culture." *Id.*

history and culture of the United States, offers more than 7 million digital items from more than 100 historical collections with no fee to users.[33] These items include books and other printed texts, manuscripts, sheet music, maps, motion pictures, photos, prints and sound recordings, and the richest parts of the collection appear to be public domain works from prior to 1920. Copyright restrictions manifestly limit the scope of what the Library of Congress can make publicly available.[34]

2. Substantial Numbers of Older Works Are Not Exploited Commercially

It also bears emphasizing that the amount of material that could potentially remain unavailable to the public in a meaningful way for many more years appears to be vast. One indicator of this is the apparent scarcity of books published between 1920 and 1950 that are now in print. According to *Books In Print*[35], the number of books in print for the past three years exceeds 600,000, while all titles for the decades of 1920-1950 number less than 6,000. *Id.* The paucity of republished works exists despite Congress' extending the terms for such works from 56 to 75 years in 1978. The table below indicates approximately how few of these older books have sufficient commercial appeal to warrant their republication.

33. Library of Congress, American Memory: Historical Collections for the National Digital Library, *available at* http://memory.loc.gov (last visited May 17, 2002).

34. *See* Caroline R. Arms, *Getting the Picture: Observations from the Library of Congress on Providing Online Access to Pictorial Images*, 2 Library Trends 379 (1999) ("For public access, LC has focused on converting materials produced by the U.S. Government, those likely to be out of copyright by virtue of their date of creation, or collections where a single organization or individual appears to hold copyright and commercial interest is unlikely.").

35. *Books In Print Online* (2002), *available at* http://www.booksinprint.com (last visited April 2, 2002).

Comparison: Books Registered (1927-1951) vs. Books Remaining In Print (2002)[36]

Years	Books Registered	Books Remaining In Print	Remaining In Print (%)
1927-31	66,947	646	1.0
1932-36	56,723	682	1.2
1937-41	59,192	929	1.6
1942-46	41,261	911	2.2
1947-51	52,530	1720	3.3

Similar problems exist with regard to works in other media, for example, historically important sound recordings by African Americans in the early 20th century. One scholar estimates that at least 800 commercial recordings were made by African Americans during the period from 1890 to 1919.[37] These include the pre-1920 output of pioneering Broadway star Bert Williams, composer/conductor W.C. Handy and the Tuskeegee Institute Singers, as well as recordings by bandleader and war hero James Reese Europe, tenor Roland Hayes and the Fisk University Jubilee Singers. *Id.* Despite their age, it is estimated that half of these recordings would be protected by existing copyright law due to state law protections for sound recordings that still persist

36. The column "Books Registered" is derived from information in the Annual Report of the Librarian of Congress for each of the years in question as to the number of hardbound books and softbound books or volumes registered with the U.S. Copyright Office. The column "Books Remaining In Print" is derived from an electronic search of Books In Print Online, *supra* note 35, for books listed as in print and indicating a "Publication Date" of the year in question.

37. E-mail from Timothy Brooks to Arnold Lutzker, Counsel of Record (Apr. 24, 2002).

under federal law. *Id.*[38] Even though phonorecords of most of these recordings still exist, the companies that own the copyrights have apparently reissued only two such titles — less than one percent.[39]

3. CTEA Harms Scholarship, Education and Creative Use of Older Works

Congress conducted no meaningful study to establish that for a significant minority, much less a majority, of copyrighted works, there is any material likelihood that copyright owners have an incentive to republish. To the contrary, as the foregoing examples illustrate, unless a market for a work is provable, owners of older works are not likely to republish them. Aside from a small selection of classic novels, movies and musical

38. The problems created by CTEA are even more complex for pre-1972 sound recordings than for other works. Federal copyright protection does not extend to sound recordings first fixed prior to February 15, 1972, and state common law and statutory protections apply to such sound recordings until February 15, 2067. 17 U.S.C. § 301(c). *See also Goldstein v. California*, 412 U.S. 546 (1973) (state law protections for sound recordings not preempted for those fixed prior to February 15, 1972). Absent this federal preemption, the protection for sound recordings was potentially perpetual. *Id.* at 550, 560-61. Under the 1976 Copyright Act, preemption was to take effect on February 15, 2047. *See* 1976 Copyright Act, *supra* note 14. Under CTEA, that date was extended by twenty years. 17 U.S.C. § 301(c). Consequently, commercially released sound recordings from the turn of the last century will potentially be protected for a total of more than 150 years after their commercial release. *See generally* 1 Nimmer On Copyright § 1.01[B][2][d], § 4.06[B] and 2 Nimmer On Copyright § 8C.03.

39. Brooks e-mail, *supra* note 37. At least 130 such titles have been issued by record labels in countries outside the U.S. in which the recordings are not protected by copyright or by individuals within the U.S. who have not obtained permission to reproduce them. *Id. See also* Register of Copyrights, Draft Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 23 (Oct. - Dec. 1975) (Copyright Office was "convinced that a real problem exists with large and growing catalogs of recordings that record companies are sitting on and will neither release nor license.").

works, no reasonable expectation for republication by copyright owners exists.

As is discussed in more detail in other briefs, CTEA imposes huge burdens on creative, educational and scholarly activities involving works protected by extended terms. Users of older works are self-censoring their published research in order not to run afoul of enlarged copyright terms. Because of the Copyright Act's prohibition on creation of derivative works based on a copyrighted work, *see* 17 U.S.C. § 106, the burdens copyright law places on the creative process are as onerous as they are in the republication context.[40] Scholarly journals and publishers are often extremely cautious about publishing scholarship involving older works. One scholarly journal, for example, refused to publish a piece of scholarship involving correspondence from the Civil War era unless the researcher obtained signed permissions from families and other copyright owners of the letters being quoted.[41] The last Civil War veteran died in 1959, so conceivably his correspondence could, due to CTEA, be under copyright until 2039. *Id.* It is the rare scholar who can undertake the costly and time-consuming genealogical and probate inquiries necessary to clear copyrights in such works. As a consequence, new works often cannot extensively quote primary sources, and scholarship and the public understanding of our history suffers.

CTEA also exacerbates the problems of educators who seek to use older works. The Copyright Office's recent study on distance education observes that the difficulty educators face in obtaining clearances to use older works in the digital distance education environment "may have become more acute over recent years" in part because of CTEA's retrospective twenty

40. *See generally* Bard & Kurlantzick, *supra* note 21 at 41-44, 47 J. Copr. Soc'y (inhibiting effects of term extension on creative uses of works).

41. Peter B. Hirtle, *Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Use* 48 J. Copyright Soc'y 259 (2001).

year term extension.[42] But digital distance education is not the only context in which educators face these issues.

One law school librarian reports that faculty who teach courses in philosophy of laws and similar topics often draw on texts from the 1920s and 1930s for course readings.[43] Although it is the library's understanding that copyrights in vast numbers of works have lapsed, caution by the library and law school administration deters use of texts from this era without clearance or permission from copyright owners. *Id.* Many publishers no longer exist, and often their assigns do not know the publication in question. *Id.* Some require the institution to obtain parallel permissions from authors or heirs who cannot be located. *Id.* Others request royalties even though they cannot prove copyright ownership. *Id.* This process results in an enormous drain on the institution's time and resources, and often leads faculty to select alternate readings for which clearances may be less problematic. *Id.*

These problems become more complex when newspapers or other periodicals are involved. A librarian at the University of Washington reports that the university's Ethnic & Community Press project has been hindered by CTEA.[44] The collection is a digital compilation of newspapers that document the history of U.S. ethnic and community newspaper publishers. *Id.* The newspapers and stories were selected to complement a course on the history of mass communications offered approximately once per year to over 100 students. *Id.* Uncertainties exist as to whether the newspapers, journalists,

42. U.S. Copyright Office, Report on Copyright and Digital Distance Education: A Report of the Register of Copyrights 165-66 (1999).

43. E-mail from Laureen C. Urquiaga, Access Services Librarian and Copyright Coordinator for the Howard Hunter Law Library in the Reuben Clark Law School at Brigham Young University, to Carol Ashworth, American Library Association (April 17, 2002).

44. E-mail from Lizabeth Wilson, Director of University Libraries, University of Washington, to Prue Adler, Associate Executive Director, Association of Research Libraries (May 15, 2002).

and/or photographers own rights, and constraints on the library's resources make appropriate inquiries extremely difficult and time-consuming. *Id.* This, in turn, inhibits development of the collection and its use in the classroom. *Id.*

B. Purported Benefits For Preservation and Access are Largely Unfounded

As noted above, Congress believed that CTEA would benefit the public by encouraging copyright owners to preserve and make the works they own accessible to the public. But it appears that this benefit is largely illusory. First, the historical record raises serious questions as to whether copyright protection has consistently or effectively induced copyright owners to preserve even unique embodiments of creative works. As shown below, some owners (especially in the sound recording and film industries) have neglected unique and numerically-limited embodiments of works to the point that they are deteriorated and unusable. In many cases, they have deliberately destroyed such materials.

According to one investigative report, "as many as a million or more recordings from long-defunct or inactive small [independent record] labels are lying unattended and gathering dust in storage rooms, basements, and garages all over the country — or have been destroyed or buried in landfills."[45] The most dramatic story of neglect and destruction in the sound recording industry is RCA's demolition of its Camden, New Jersey warehouse in the early 1960s. "The warehouse, according to collectors and industry veterans, held four floors of catalog product — pre-tape-era material ranging from metal parts, acetates, shellac disc masters, and alternate takes to test pressings, master matrix books and session rehearsal recordings." *Id.* Though some material was salvaged before the destruction, the building was dynamited and the wreckage bulldozed into the Delaware River. *Id.*[46]

45. Bill Holland, *Labels Strive to Rectify Past Archival Problems*, Billboard, July 12, 1997.

46. Similar problems exist with motion pictures. *See* 1 National Film Preservation Board, Film Preservation 1993: A Study of the Current State of American Film Preservation: Report of the Librarian of Congress (Cont'd)

Second, additional copyright protection cannot induce copyright owners to preserve embodiments of creative works unless the copyright owner receiving this benefit has custody and control over the (presumably rare and deteriorating) physical medium in which the work is embodied. Because ownership of rights in works and ownership of rights in the physical media in which they are embodied often become separated over time,[47] the benefits of CTEA for preservation are often not forthcoming. For example, the Library of Congress makes its extensive collections of sound recordings available to record companies who have used it as a haven of last resort.[48] In the collection, "reissue producers have discovered copies of rare recordings that the labels themselves have lost or thrown away the masters of in periodic misguided 'housecleaning' efforts over the years." *Id.*[49] Thus, there is a significant blind spot in the purported rationale for an additional twenty years of copyright protection.

(Cont'd)
§ 2 (1993) ("1993 Film Study") ("a great percentage of American film has already been irretrievably lost — intentionally thrown away or allowed to deteriorate"; "fewer than 20% of the features of the 1920s survive in complete form"; preservation problems most acute for works of little commercial value, like newsreels, documentaries, avant-garde and independent productions); *see also* 1 National Film Preservation Board, Television and Video Preservation 1997: A Report on the Current State of American Television and Video Preservation: Report of the Librarian of Congress, Executive Summary (1997) (kinescope or film copies of early live television broadcasts were made selectively, other programs deliberately destroyed, videotapes erased and recycled; most devastating losses are of local television station news footage).

47. *See* 17 U.S.C. § 202 (ownership of copyright is distinct from ownership of any material object in which a work is embodied).

48. Bill Holland, *Library of Congress To Grow Sound, Visual Archives Getting New Facility*, Billboard, Dec. 13, 1997.

49. *See also* 1993 Film Study, *supra*, §§ 6A, 8, and 9 (material objects embodying motion pictures frequently preserved at public expense by public archives who are restricted by copyright law and contractual agreements from making motion picture works widely available to the public; studio deposit agreements prohibit commercial use of publicly archived film materials after copyrights expire).

C. Harmonization Is An Illusory Rationale

A chief rationale advanced in support of CTEA was that it would "harmonize" U.S. copyright law terms with those of countries in the European Union ("EU"). *See, e.g.*, Sen. Rep. at 7-10. This is not only a dubious goal as a legal matter, it is overstated as a factual matter. As the briefs of Petitioners and others make clear, CTEA actually "harmonizes" on a selective basis, and in fact creates substantial disharmony with the laws of countries of the EU and other nations with whom the U.S. conducts substantial trade.[50] Most EU countries limit the term of works owned by corporate entities to seventy years, and CTEA expands the disharmony between these terms and U.S. terms from five to twenty-five years. Sen. Rep. at 31 (Minority views of Sen. Brown). As to an individual's term of copyright, Australia, Canada, China, and Japan grant protection for life of the author plus fifty years.[51] This is consistent with the requirements of the Berne Convention, to which the U.S. adhered in 1989.[52] Whatever dubious "harmony" CTEA may create as to European Union countries, it certainly creates disharmony with other countries' copyright laws.

A purported benefit of "harmonization" for U.S. copyright owners is that it will result in substantial revenue for U.S. copyright interests. *See* Sen. Rep. at 7, 9. But Congress largely overlooked the costs that CTEA will impose on the American

50. The amount of "harmony" even within the EU appears to have been overstated. *See* Julian Barnes, *Copyright Wrongs*, Wall Street J. Jan. 31, 2002, at A16 (national anomalies complicate EU term calculations); *see also* Peter Groves, *Toad and Ratty In Clover*, The Times, June 6, 1995 (complications arising from EU restoration of copyrights to public domain works).

51. Paul Edward Geller, International Copyright Law and Practice § 3[1] at AUS-30, CAN-37, CHI-27 and JAP-21 (2000).

52. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988). In 1976, Congress noted the then German copyright term of life plus 70 years, *see* 1976 Act House Report at 135-36, but nevertheless deemed harmonization with the Berne standard of life plus 50 years to be essential to passage of the 1976 Act, rather than longer terms by individual nation standards.

public.[53] The U.S. must recognize longer copyright protection for works of authors in the EU and pay a premium for the privilege of acquiring copies of such works.[54] Congress's failure to balance CTEA's perceived benefits against these added costs and losses undermines any claim that the enlargement of copyright terms was congruent and proportional to the aim of promoting the progress of science and useful arts.

D. Section 108(h) Does Not Significantly Mitigate the Harms Imposed By CTEA on the Public Domain

CTEA does contain a limited exemption for libraries and archives to enable them to reproduce, distribute, display, and perform certain works in the final twenty years of their extended terms for research and preservation purposes. 17 U.S.C. § 108(h). Although that provision on its face appears useful to the covered institutions, the exemption may ultimately do little, as a practical matter, to mitigate the substantial burdens imposed by CTEA. By its terms, it only covers "published" works. *Id.* It only applies when the works are not subject to "normal commercial exploitation," when a copy cannot "be obtained at a reasonable price," and when the copyright owner has not filed proper notice with the Copyright Office advising that the work is available on those terms. *Id.*

The "normal commercial exploitation" and "obtained at a reasonable price" requirements are particularly problematic. In December 1998, the Copyright Office issued interim regulations and requested comments on how a copyright owner or its agent may provide notice to libraries and archives that a published work in the final twenty years of its extended term of copyright is subject to normal commercial exploitation or that a copy can be obtained at a reasonable price. 63 Fed. Reg. 71,785-71,788 (1998). A number of groups filed comments, including copyright owner industry groups such as the Motion Picture Association of America. They assert that if a work is

53. *See generally* Bard & Kurlantzick, *supra* note 21, 47 J. Copr. Soc'y at 17-18, 30-35.

54. *See id.* at 56-61.

subject to licensing by the copyright owner, *even when the copyright owner has no access to or control over a copy of it*, then it is subject to "normal commercial exploitation" under Section 108(h).[55] Further, if a copy is available at a second-hand store or rental outlet for a reasonable sum — even if it is available only in an obsolete format — they claim it can be "obtained at a reasonable price." *Id.* at 9-11.

The Copyright Office has not, more than three years after issuing its notice, acted upon these comments or issued final rules. Intense challenge from copyright owner groups and lack of guidance from the Copyright Office render Section 108(h) an uncertain allowance on which libraries and archives cannot rely. Beyond these limitations, Section 108(h) does nothing to protect the activities of persons who are not qualifying institutions or whose activities are not covered by its limited scope. Most importantly, it does not permit the dissemination of works in extended terms or sanction any subsequent uses by other users.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and reversed.

Respectfully submitted,

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55. National Music Publishers Ass'n, *et al.*, Reply Comments on Interim Rule, Docket No. 98-13, at 8-9 (filed April 1, 1999).

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* THE INTERNET ARCHIVE, PRELINGER ARCHIVES, AND PROJECT GUTENBERG LITERARY ARCHIVE FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

This brief *amici curiae* in support of Petitioners is submitted by the Internet Archive, Prelinger Archives, and Project Gutenberg Literary Archive Foundation ("The Archives") pursuant to Rule 37 of the Rules of this Court. Amici urge that the Court reverse the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

The Internet Archive[2] is a public non-profit organization that was founded to build an "Internet library," with the purpose of offering permanent access for researchers, historians, scholars, and artists to historical collections in digital format. Founded in 1996 and located in the Presidio of San Francisco, California, the Archive receives data donations and digitizes source material from a multitude of sources, including libraries, educational institutions, and private companies.

Prelinger Archives[3] is a commercial, for-profit moving image and sound archive that licenses footage of historical images and sounds to numerous customers, from Hollywood motion picture studios to broadcast and cable television networks and production companies to software developers and publishers to advertising agencies, concert promoters, government agencies, artists, and non-profit organizations.

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1. Letters from both parties consenting to the filing of this brief are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, made a monetary contribution to the preparation or submission of this brief. Professor Lemley contributed to this brief in his personal capacity, and its contents should not be attributed to his employers.

2. For more information on the Internet Archive, *see* http://www.archive.org/about/index.html

3. For more information on Prelinger Archives, *see* http://www.prelinger.com/prelarch.html

Project Gutenberg Literary Archive Foundation ("Project Gutenberg")[4] is the oldest and one of the largest publishers of public domain literary works on the Internet. Beginning in 1971 with the Declaration of Independence, Project Gutenberg has published over 5000 ebooks, and is currently adding almost 50 volumes every week. These are listed at www.gutenberg.net and are available free of charge to anyone with Internet access. Project Gutenberg is a public non-profit organization and operates almost entirely through the efforts of volunteers.

Libraries and archives have traditionally preserved and provided access to society's cultural artifacts. In this era of digital technology, a new breed of libraries has sprung up: digital archives. These archives, like all libraries, foster education, scholarship, and creativity through access to information. But digital archives excel in providing access to the ephemera, the "gray material," the lost classics—material which has been difficult for traditional libraries to locate, acquire, and store. To serve their mission of preservation and access, digital archives depend on volunteers, donations and, most especially, on the public domain. Whether information such as a film is under copyright or in the public domain largely dictates the scope and nature of public access provided by archives. The Sonny Bono Copyright Term Extension Act of 1998 ("CTEA")[5] frustrates the Archives' goals of preservation and universal access, thereby denying the public its rightful access to public domain works. The Internet Archive, Prelinger Archives, and Project Gutenberg submit this brief to increase the Court's understanding of the true cost of the CTEA to our cultural heritage.

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4. For more information on the Project Gutenberg Literary Archive Foundation, *see* http://www.gutenberg.net

5. Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827.

SUMMARY OF ARGUMENT

Digital technology is changing the world. The ones and zeros that travel to, from, and through the computers we use provide powerful opportunities, especially for storage and transmission of media. Digital technology makes flawless copying simple and worldwide distribution instantaneous.[6] This ease of publishing and distributing means that material in the public domain that would otherwise have been lost forever can instead be rediscovered, restored, and made universally available.

As one result of this unprecedented ability to disseminate knowledge, the public domain has assumed a growing role in education in this country and around the world. Projects to digitize and distribute millions of out-of-copyright books, movies, and music are now underway, supported and funded by volunteers, foundations, the government, and corporations.[7] Such projects also reclaim and preserve materials that commercial publishers, distributors, and rights-holders have effectively abandoned, having deemed them commercially unviable. While rights-holders often let these films decay and books disappear, this material is invaluable to scholars researching our history, artists developing new art forms, and anyone seeking to explore our culture.

Digital technology allows us the opportunity to build a "universal" library out of these materials—a library that dwarfs the collections of Alexandria and even our modern Library of Congress. This library will expand our understanding of "public access." It will make information accessible in formats that

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6. "But, with the increased availability of broadband Internet access you can bring down a full-length motion picture in less than 15 minutes. . . ." Press Release, Motion Picture Association of America, Valenti Warns The Dangers Of Internet Piracy Before Congressional Subcommittee (October 28, 1999), *at* http://www.mpaa.org/jack/99/99_10_28a.htm

7. Raj Reddy, *Infinite Memory and Bandwidth: Implications for Universal Access to Information* (April 6, 2001) *at* http://www.cc.gatech.edu/external.affairs/anniversary/rajreddy.ppt

uniquely support and promote creativity in the arts and sciences—allowing individuals to clip and sample millions of public domain words, films, and sound recordings with ease. At the same time digitization will greatly reduce the cost of preserving our cultural history[8] and eliminate deterioration caused by the physical handling of cultural artifacts. Through digitization, we can inexpensively open the full contents of this new library to the public, especially to those for whom access has been an ill-kept promise—the distant, the disabled, and the poor.

These projects face one significant limitation: copyright. Because of copyright concerns, groups such as the Archives are effectively limited to making available only works no longer under copyright. Because Congress has repeatedly extended the duration of copyright—adding to the copyright term twelve different times in the last century alone—digital archivists are relegated to working with a public domain that no longer grows with each passing year.[9]

It was not supposed to be this way. Copyright was designed to balance an author's incentive to create with the public's interest in free and unfettered access to most works of authorship. As Justice Story explained, copyright "will promote the progress of science and the useful arts, and admit the people at large, *after a short interval*, to the full possession and enjoyment of all writings and inventions without restraint." Joseph Story, *Commentaries on the Constitution of the United States* § 502,

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8. True preservation aims to save both the content and the media in its original form. Media created in digital form are preserved in digital form; digitizing other works ensures at least some minimal preservation of content but does not meet the full goals of preservation.

9. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 443 n.23 (1984) ("[S]ince copyright protection is not perpetual, the number of audiovisual works in the public domain necessarily increases each year."). This Court's assumption about the public domain in *Sony* is undermined by the CTEA's retroactive exclusion of works from entering the public domain.

at 402-03 (R. Rotunda & J. Nowack eds., 1987) (emphasis added). The "short interval" in Justice Story's day was 14 years for most works, and 28 years for a few. By contrast, under the CTEA no work receives less than 70 years of protection, and a large percentage receive more than 100 years. Copyright is out of balance. Congress has focused on protecting authors to the exclusion of providing access to the public.

In an effort to justify this radical shift, copyright owners sometimes argue that copyright protection actually enhances access by providing incentives for publishers to make works available. Jack Valenti, President of the Motion Picture Association of America once said: "A public domain work is an orphan. No one is responsible for its life . . . it becomes soiled and haggard. . . ." Jessica Litman, *Digital Copyright* 77 (2001).

We demonstrate in this brief, however, that in the digital world older works are much more likely to be preserved and made available to the public once their copyright expires. The ease and economy of digitally capturing, storing, and distributing have reduced these costs to the point of insignificance. Works in the public domain are being digitized and made freely available at an astonishing rate. By contrast, the overwhelming majority of works from the 1920s and 1930s—those first affected by the CTEA—are not available from copyright owners at any price. Extending the copyright term retroactively gives copyright owners a windfall for a few works that they still consider valuable enough to release, while depriving the world of the benefit of tens of thousands of works each year that digital archives are ready, willing, and able to provide.

In the sections that follow, we describe four specific areas where digital archives promise to revolutionize learning and creativity—greater access, preservation, economy, and extension of works. We then demonstrate how the CTEA frustrates each to the detriment of the public interest by further diminishing the richest resource available to digital archives: the public domain. These four areas are not simply fringe benefits or surplusage residual from the creation of copyrighted works; they

are the real benefit of the bargain that the public is entitled to enjoy. The public domain may ultimately prove more important to our nation's progress than access to copyrighted works during their limited term. Should this Court permit the D.C. Circuit's decision to stand, it will be turning its back on the intent of the Framers and this Court's consistent statements that copyright serves public as well as private purposes.

ARGUMENT

I. The Public Domain Is An Essential And Historical Part Of American Intellectual Property Law

In granting Congress the power to create copyrights, the Founding Fathers recognized that information and ideas were powerful yet ephemeral assets that required narrow and limited rights designed to promote American arts and sciences both economically and culturally. They sought to strike a balance between creating incentives for authors and ensuring that the resulting works were made available to the public.

The Founders focused the rights of authors through several explicit Constitutional limitations on Congress' grant of power. First, the Constitution requires that works be original so that copyright owners cannot remove art and information from the public domain, declaring dominion over something they did not create. *Feist Publ'ns v. Rural Tel. Ser. Co.*, 499 U.S. 340 (1991); *Graham v. John Deere & Co.*, 383 U.S. 1, 5-6 (1966) (noting that Congress may not authorize the removal of knowledge from the public domain or restrict free access to materials already available). Second, works must promote the progress of the arts and sciences so the public receives value in return for each monopoly grant. *Trademark Cases*, 100 U.S. 82 (1879). Third, the First Amendment, at a minimum, requires that copyright law permit certain "fair uses" of protected works to benefit society. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985); 17 U.S.C. § 107. Finally, the Constitution permits the grant of copyrights only for "limited times." U.S. Const. Art. I, § 8, cl. 8. The "limited times"

provision guarantees that copyrights will eventually expire, and that the public will ultimately receive the right to use all works.

A healthy public domain is essential to a healthy intellectual property regime. As this Court stated in *Harper & Row*, "copyright is intended to increase and not to impede the harvest of knowledge." 471 U.S. at 545. To reap these benefits, the public must not only be permitted to make certain uses of works during the copyright term, but must also be free to make unfettered use of works through public consumption, study, and re-exposition after the copyrights expire. As the *Harper & Row* Court explained, copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, *and to allow the public access to the products of their genius after the limited period of exclusive control has expired.*" *Id.* at 546 (emphasis added). Thus, promoting public access to information is as important to intellectual property policy as creative incentives.

Striving for balance between these goals is a consistent theme in this Court's intellectual property cases. *See, e.g.*, *Graham*, 383 U.S. at 9 ("The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare. . . ."); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."); *Feist*, 499 U.S. at 349-50 (stating that the "primary objective of copyright" is to promote public welfare); *Stewart v. Abend*, 495 U.S. 207, 224, 224-25 (1990) (noting the Copyright Act's "balance between the artist's right to control the work . . . and the public's need for access"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989)

(noting the "careful balance between public right and private monopoly to promote certain creative activity"); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the limited monopoly conferred by the Copyright Act "is intended to motivate creative activity of authors and inventors . . . and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts"); *Goldstein v. California*, 412 U.S. 546, 559 (1973) (discussing Congress's ability to provide for the "free and unrestricted distribution of a writing" if required by the national interest); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors.").

From its origin in the Copyright Act of 1790 until Congress' explicit revision of the Act in 1976, copyright required authors to register their copyrights for a distinctive first term, with an option to renew for a separate extended term.[10] At the time of the 1976 Act, the term of copyright was 28 years, with an option to renew for an additional 28.[11] The registration and renewal processes were part of the so-called "formalities" of copyright law. Each of these formalities provided different but equally important checks on the limited monopolies granted by copyright. First, registration ensured that authors or those who

10. *See generally* Tyler T. Ochoa, *Patent and Copyright Term Extension and The Constitution: A Historical Perspective*, 49 J. Copyright Soc'y 19, 29-45 (2002). While this Court interpreted the 1909 Act as requiring at least notice if not registration, *see Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 59 S. Ct. 397, 83 L. Ed. 470 (1939), the language of the Act itself was not officially changed to remove the registration requirement until 1976.

11. *Id.*

held the rights to their works could be located by those who wished to license a work. Second, by requiring the copyright owner to actively renew his or her rights in a work, it forced the owner to consider the value, ensuring added protection was only afforded when the rights-holders remained actively interested in exploiting their works. The formalities eliminated the problems of absent, missing, dead, out of business, or uncaring rights-holders, thus providing some balance to the additional years of protection offered by Congress.

In 1976, Congress undertook a tremendous and unprecedented overhaul of U.S. Copyright Law. Having passed a series of short-term extensions in 1965, 1967, 1968, 1969, 1970, 1971, 1972, and 1974, Congress finally removed the registration requirements, extending copyright for all works, registered or not, to the full life plus 50 or 75 years. Later, in 1992, Congress automatically renewed all remaining copyrights, regardless of whether the owner sought to renew the work.[12] So expired the procedural guardians of the public domain; so began Congress' efforts to undermine the constitutional protections of "promot[ing] . . . Progress" and "limited times."

A quick look at the registration and renewal data for years before 1976 shows that an overwhelming majority of works fell into the public domain because creators did not seek extended copyright protection.[13] For example, of the 25,006

12. Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 266 (June 26, 1992) (amending Sec. 304 of Title 17 to make renewal automatic and renewal registration optional for works originally copyrighted between January 1, 1964 and December 31, 1977). In fact, Congress enacted this unprecedented change directly against the recommendation of the Register of Copyrights. In a report submitted to Congress in 1961, the Register specifically recommended that if a term extension was warranted, Congress should retain the two-term structure and simply extend the renewal term to forty-eight years. Ochoa, *supra* note 10, at 39.

13. *See* Register of the Library of Congress, Register's Report, *in* 2 *Studies on Copyright* at 1251 (Arthur Fisher Memorial ed., June

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works registered in 1883 a mere 894 were renewed in 1910.[14]

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1960) ("Experience indicates that the present initial term of 28 years is sufficient for the great majority of copyrighted works: *less than 15 percent of all registered copyrights are being renewed at the present time.*") (emphasis added); Barbara A. Ringer, Study No. 31: Renewal of Copyright, *in* 1 *Studies on Copyright* 513-514 (Arthur Fisher Memorial ed., June 1960) ("The committee reports accompanying these bills indicate clearly that the purpose of adding the renewal device was to allow the large bulk of copyrighted works to fall into the public domain at the end of a short definite term, while permitting a much longer term for works of lasting value." (discussing Congressional proposals in 1906-1908 to change copyright term and renewal periods)); H.R Rep. No. 7083, pt. I, at 14 (1907):

> It is said that under existing law no extension of the term beyond the first period of twenty-eight years is asked for on 95 percent of the copyrighted books. Your committee provide [sic] in this bill that unless within the year next preceding the expiration of twenty-eight years from first publication the copyright proprietor shall give notice that he desires the full term, the copyright shall cease at the end of twenty-eight years. It is believed that under this provision more than 90 percent of copyrighted books will fall into the public domain as early as they would under existing law.

The comments of the Senate committee were to the same effect. S. Rep. No. 6187, pt. I, at 7 (1907) (noting that "[t]hese provisions were aimed at putting ephemeral works in the public domain after 28 years, and at making it easy for the public to determine when a copyright would expire.")

14.

1883 registrations 25,006	1910 renewals 894	3.57%
1890 registrations 42,789	1917 renewals 1,845	4.31%
1900 registrations 94,798	1927 renewals 4,686	4.94%
1910 registrations 108,067	1937 renewals 8,589	7.94%
1920 registrations 124,450	1947 renewals 13,201	10.60%
1930 registrations 166, 855	1957 renewals 21,473	12.86%
1932 registrations 124,500	1959 renewals 21,500	17.27%

Ringer, *supra* note 13, at 618, Tbl 2.

Thus over 96% of works from that year fell into the public domain after only 28 years—despite the availability of additional copyright protection. Later numbers show that copyright owners continued to let the overwhelming majority of their works lapse throughout the first part of the 20th Century.[15] As a result of the 1976 Act and the 1992 amendments, all copyrighted works under this two-tiered system received 47 additional years of protection, regardless of whether or not the copyright owner intended to register the work. Under the CTEA, these works now have 67 more years. If 96% of owners did not care enough to renew their copyrights after 28 years, there is no reason to expect that when handed decades of additional, unsought "protection" they will become devoted caretakers. These are the real orphans of the copyright system—the "soiled and haggard" works that Congress has endowed with unwanted and unsupervised additional protection.

Both the history of this country and the history of this Court have proven that the public domain is a fundamental part of copyright law. The elimination of important constitutional and prudential restraints places extraordinary pressure on the few remaining counterbalances, such as fair use, inhibits the growth of the public domain, and impedes our progress.

II. The CTEA Prevents Works That Have Reached The End Of Their Proper Copyright Term From Entering The Public Domain

By unconstitutionally extending the term of copyright, the CTEA single-handedly deprives our schools, libraries, and children of enjoying almost any benefit that digital archives have to offer. The CTEA's retroactive and prospective extensions have frozen the public domain in time.

When one asks the leading experts on digital archiving "what is the single most significant barrier to preserving our cultural heritage?" one uniform answer resounds: copyright concerns. Panel on Digital Libraries, President's Information Technology Advisory Committee ("PITAC"), *Digital Libraries: Universal Access to Human Knowledge* 21 (2001), *at* http://www.ccic.gov/pubs/pitac/

15. *Id.*

pitac-dl-9feb01.pdf; Michael Lesk, *Practical Digital Libraries* 223 (1997) ("Issues related to intellectual property law are the most serious problems facing digital libraries.").[16] The future of digital archives depends on a predictable and reasonable limit to copyright terms. Until works reach the end of their term, it is simply impossible for librarians and archivists to seek rights from millions of copyright owners. Unless copyrights expire after "limited times," millions of historical and cultural works will be unavailable to the majority of the public and will continue to disappear in their original form. The ultimate dedication of these works to the public domain will be the promise that never comes due.[17]

Consider some statistics. In the year 1930, 10,027 books were published in the United States.[18] In 2001, all but 174 of

16. *See also Copyright Term Extension Act: Hearings on H.R. 989 Before the Subcomm. On Courts and Intellectual Property of the House Comm. On the Judiciary*, 104th Cong., 1st Sess. 10 (1995) (statement of Dennis S. Karjala, Professor of Law, Arizona State University College of Law)

> As a result [of passing the CTEA], current authors who wish to make use of *any* work from this period [after 1923], such as historians or biographers, will need to engage in complex negotiations to be able to do so. Faced with the complexities of tracking down and obtaining permission from all those who by now may have a partial interest in the copyright, a hapless historian will be tempted to pick a subject that poses fewer obstacles and annoyances.

17. Project Gutenberg estimates that, based on current growth rates for creating ebooks, at least one million pre-1923 public domain books will be available online by the end of the decade. But for the CTEA, we could already have digital copies of the original *Winnie the Pooh* by A.A. Milne (1926), *The Magic Mountain* by Thomas Mann (1927), *The Great Gatsby* by F. Scott Fitzgerald (1925) and *The Prophet* by Khalil Gibran (1923) to name but a few. *See also* Carnegie Mellon University Million Book Project (creating an Internet collection of one million books) *at* http://zeeb.library.cmu.edu/Libraries/LIT/Projects/1MBooks.html.

18. *American Library Annual and Book Trade Almanac for 1872-1957* ("*Almanac*").

these titles are out of print.[19] While a copy or two may exist in a library or a used bookstore, the copyright holders cannot or do not make these titles available to the public. But for the CTEA, digital archives could inexpensively make the other 9,853 books published in 1930 available to the reading public starting in 2005. Yet because of the CTEA and the likelihood of future term extensions, we must continue to wait, perhaps eternally, while works disappear and opportunities vanish.

Digital archives can provide public to access these "rare" works that are no longer made available by the copyright holder *if* they enter the public domain. A case in point is the Steven Spielberg Digital Yiddish Library, which houses twelve thousand digitized Yiddish books. This library has helped turn a dying literature into "the most in-print literature on the planet."[20] Digitization of these works, most of which are in the public domain, brings both a literature and an enriched understanding of the Yiddish culture to people across the globe.[21]

Other parts of our culture and heritage remain obscured behind the wall of copyright. The early volumes of periodicals such as *The New Yorker*, *Time Magazine*, and *Reader's Digest* provide an unparalleled window into early 20th century American life and culture.[22] Unlike the Yiddish literature in the Spielberg

19. *Books in Print Online* ("*BIP*"), *at* http://www.bowker.com.

20. Eric Goldsheider, *For a Dying Literature a Digital Savior*, N.Y. Times, May 6, 2002, at A19.

21. *See also The Bibliotheca Alexandrina: A Truly Digital Library for the 21st Century*, at http://www.archive.org/news/bibalex_p_r.html (documenting the Internet Archive's donation of facilities to scan 50,000 Arabic books for distribution on the Internet).

22. The promise of reviving these early icons of Americana from obscurity is not merely speculative. The Frank Capra movie, *It's a Wonderful Life* lay gathering dust in a movie studio until in the early 1970's when its copyright expired. Soon after becoming part of the public domain, it was aired by Public Broadcast Stations and quickly became a Christmas tradition on many stations and for many families. *See* Roger

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library, few if any of these works can be found online because they are still under copyright. Until they fall into the public domain, the process of clearing rights for each article, drawing, and photograph makes digital archiving of such composite works practically impossible.

The Prelinger Archives faces this dilemma every day. Prelinger began collecting "ephemeral" films in the early 1980s—films of critical social and historic value that have been orphaned or abandoned by their copyright owners. These include industrial motion pictures, home movies, advertising clips, training and educational films, outtakes, and newsreels—the kind of images featured in shows like *The Twentieth Century* with Walter Cronkite and in the ground-breaking historical documentary *Atomic Café*. In 1985, Prelinger formalized his archive to promote the reuse of public domain moving image works.

Of the 48,000 films in the Prelinger Archives, close to 60% (approximately 28,800) are in the public domain. The other 40% (approximately 19,200) remain under copyright. A peculiar attribute of Prelinger's collection, and almost all film archives, is that the dividing line between public domain films and copyrighted films splits almost exactly along the year 1964. Close to 85% of Prelinger's pre-1964 films are in the public domain, compared to only 28% of post-1963 films.[23]

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Ebert, *It's A Wonderful Life*, The Chicago Sun-Times, *at* http://www.suntimes.com/ebert/greatmovies/wonderful_life.html Had the CTEA extension been in place, this classic film would not have reemerged until 2041.

23. Of the 16,226 films Prelinger has formally researched for copyright clearance, 9,128 (56.26%) are pre-1964 and 7,098 (43.74%) are 1964 and later. Of the pre-1964, 1,110 are still copyrighted (15.81%) and 6,022 (84.19%) are public domain. For films 1964 and later, 1,432 (72.32%) are copyrighted and only 548 (27.68%) are public domain. Prelinger believes these numbers are typical and expects that as he searches the remainder of his collection, he will find similar percentages on either side of the 1964 cut-off date.

This disparity results solely from Congress' multiple extensions of copyright from 1964-1976 and the automatic renewal of 1992, making 1963 the last year that non-renewed works actually fell into the public domain. Prelinger cannot offer copyright protected films for stock footage or allow off-site public access. The 1992 Amendment obliterated the public's pending rights to these films and kept the films cloistered behind the walls of their copyright—despite the lack of interest from their owners in renewal or use of their rights.[24] Because of the elimination of the renewal requirement, the perpetual extension of copyright term and the enormous clearing costs imposed by the post-1976 lack of formalities, a substantial portion of Prelinger's growing collection of important social and historical films remain off limits to the public.

In *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), the District of Columbia Court of Appeals completely ignored the role of the public domain in copyright law as set forth within Art. I, § 8. cl. 8 of the Constitution. The Court of Appeals stated that Congress would exceed its power under the Copyright Clause if it made copyright protection permanent. *Eldred*, 239 F.3d at 377. But then, with a wink and a nod, it gave Congress the go-ahead to perpetually extend copyright protection as long as each "extension" comes with a date certain. In holding that the introductory language of the Copyright Clause fails to impose

24. *See supra* notes 13-15. *See also* Letter dated March 31, 1997, from Larry Urbanski, Chairman of the American Film Heritage Association, to Senator Strom Thurmond, opposing S. 505, at http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/letters/AFH.html

> There is an important industry in the United States, dependent on film in the public domain. Past copyright legislation has reduced the number of motion pictures in public domain considerably, causing hardship for this industry. Commercial film archiving and film preservation has already stopped for works created after 1962 thanks to 'automatic renewal'. [The CTEA's] extension will further hamper commercial archives.

any substantive limit on congressional power, and that said power is immune from First Amendment scrutiny, the Court of Appeals reduced the public domain to an illusion.

Without some check on Congressional power, it is unlikely that any of the cultural and historical works from the first half of this century will *ever* enter the public domain. Limits must be found. If this Court does not require Congress to respect the limitations of "promoting" and "limited times," the public will never experience the value of the vast majority of works created—the value made real by digital archives.

III. Digital Archives Breathe New Life Into The Public Domain

In the modern world of publishing, the public domain presents a thriving and vibrant area of learning and creativity. Far from the moldering books and deteriorating dusty film canisters of previous decades, today's collections can be digitally stored, accessed and distributed. This new global decentralized platform revolutionizes access and use of public domain works.

A. Digital Archives Allow Us To Preserve Our Cultural Heritage

1. Copyright Owners Fail To Preserve The Vast Majority Of Creative Works For Public Access

Millions of copyrighted works are created every year. In comparison, the number of works actually maintained and available to the public is quite small. Today, the number of volumes available for purchase in the U.S. is a tiny fraction of the volumes published in the United States.[25] Libraries and

25. For example, in 1910, 13,470 books were published in the United States. *Almanac*, *supra* note 19. In 2001, only *180* of these titles are available for purchase from any publisher worldwide. *BIP*, *supra* note 19. The numbers for other decade years are similar: 1920 (8422 published, 307 in print in 2001); 1930 (10,027 published, 174 in print); 1940 (11,328 published, 224 in print); 1950 (11,022 published, 431 in print). *Compare Almanac with BIP*. The number of published books has (Cont'd)

archives preserve some of the books no longer for sale. However, public access to literary works under a system of physical archiving is fiscally and spatially constrained. The combined archives of public research libraries in the United States hold approximately 600 million titles total, a small percentage of the world's published works over the last 200 years.[26] Moreover, every year, physical decay and accidental loss (not to mention limited shelf and storage space) reduce the number of books actually available. This diminution of available copies applies equally to movies and sound recordings.[27]

Like the D.C. Circuit, Amici believe that "preserving access to works that would otherwise disappear . . . 'promotes Progress'." *Eldred*, 239 F.3d at 380. Despite the supposed incentives copyright offers to authors and publishers, today much of our cultural heritage lies fallow, withheld from the public domain by bloated copyright terms, and removed from the

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dramatically increased, e.g. 1984 (57,087), 1995 (65,288), 1996 (57,132). *BIP*, *supra*. Thus, the number eventually lost to the public because of excessive copyright terms will be even greater in years to come.

26. National Center for Education Statistics, U.S. Department of Education, NCES 2001-341. *Academic Libraries in the United States: Fiscal Year 1998*, Tbl 5A (providing total number of paper volumes: 878,906,177; total number of paper titles: 495,724,813; total number of microform units: 1,062,082,077; total number of electronic titles: 3,473,225, and total number of audio-visual materials-units: 92,305,707).

27. In 1994, the Librarian of Congress stated, "Of America's feature films of the 1920s fewer than 20% survive; and for the 1910s, the survival rate falls to half that." James H. Billington, Librarian of Congress, *Preface to Redefining Film Preservation: A National Plan: Recommendations of the Librarian of Congress in consultation with the National Film Preservation Board* (August, 1994) *at* http://www.loc.gov/film/plan.html. According to Rick Prelinger, many films are lost every year because many small copyright holders, like educational publishers, must eliminate their stock for next year's supply; worse yet, these firms commonly go out of business or file for bankruptcy, often resulting in loss of all copies of past works.

stream of commerce because copyright holders reap little profit from them.[28] The truth is that by the time even pre-CTEA copyright terms expire, few books, movies, or musical works are being published for profit. Most copyright owners let their works fall out of print, letting them languish in literary limbo.[29]

The full benefits of our entire cultural heritage are forestalled while a few copyright holders derive profit from a relatively small number of works. For some works, extending the period between their decline in profitability and their entry into the public domain is more than just a delay—it is abandonment. For works recorded on film and other less stable mediums, the CTEA extension threatens to lock them up beyond the time when they can be truly preserved. If the CTEA stands, the public's share of the copyright bargain will in many instances literally blow away on a breeze. The only way to revive these works is to let them reach the natural end of their term so that they fall squarely into the public domain. Once there, digital archives can save these works for future generations.

28. *See also* Kai-Lung Hui & Ivan P.L. Png, *On the Supply of Creative Work: Evidence from the Movies*, 92 Am. Econ. Rev. 217 (2002) (concluding that the extended copyright term of the CTEA had relatively little impact on new creative activity in the movie industry).

29. *See supra* note 25 and accompanying text. It is worthy to note that the rights afforded to copyright owners under 17 U.S.C. § 106 do not address maintenance of works. Therefore, it can be presumed that there are few if any incentives for copyright owners to preserve works. That responsibility has been, and should be, left to our public libraries and archives as guardians of the public domain.

2. Digital Archives Preserve Copyrighted Works and Prevent Their Permanent Loss

Digital archives offer a solution to the problem of preservation. Films, books, and sound recordings that enter the public domain can be digitized quickly, efficiently and cost-effectively ensuring the availability of their content and protecting the original work against further deterioration. Every week, Project Gutenberg publishes the e-texts of almost fifty public domain books.[30] Digitizing a film, a book, or a sound recording makes a perfect copy of the work. Without harming the original, further copies can be rendered as backups, preventing a catastrophe such as the great fire in Alexandria from destroying our heritage.

Our culture is exploding off the printed page into film, video, and sound. The world produces between one and two exabytes (a billion, billion bytes) of information each year.[31] Only a tiny percentage (0.003) of this creativity takes the form of a printed page.[32] The vast majority of this information takes the form of sound, images, and numeric data.[33] With each passing day it becomes increasingly important that our libraries have the ability to collect and store these formats. Without digital archiving, the increasing cost and diminishing opportunity to preserve these works will nullify our efforts to save them for future generations. Utilizing currently available digital

30. Project Gutenberg, with the support of the Vital Spark Foundation and in conjunction with ClassicalArchives.com, is currently putting the scores of 50 works of classical music on line. These scores are available for use by students and performers. They can be marked up for their own performances. Creation of computer-generated performance from the scores is also supported.

31. Peter Lyman and Hal R. Varian, *How Much Information*, Executive Summary (2000), *at* http://www.sims.berkeley.edu/how-much-info

32. *Id.*

33. *Id.*

technology, we can build comprehensive collections that capture media works in their most pristine forms and preserve them forever.

Librarians and archivists have long been the stewards of our cultural history. The passage of the CTEA does not change authorial incentives in support of preservation. Instead, it keeps creative works from librarians and archivists who stand ready to preserve them *all*, not just a favored few.

B. Digital Archives Promote Full Public Access To Our Cultural Heritage

Digital archives hold out the promise of universal access to our cultural heritage. Today's libraries provide free public access for some people to some of this heritage. However, any single physical library can contain only a small fraction of humanity's cultural artifacts[34] and primarily serves its proximate community. As mentioned above, millions of copyrighted works are created every year, yet after 95 years, few remain in circulation. Most books are out-of-print; many movie reels and recordings are lost or damaged.[35] For a large segment of the public, especially those in rural and remote locations and those searching for material on a tight timetable, our cultural reserves are essentially out of reach.

In contrast, the Internet—the dominant platform for access to digital archives—provides relatively unlimited low cost capacity to support both the archiving of, and universal access to, traditional printed works, as well as audio, video, and still

34. United States public libraries contain approximately 784,562,000 volumes. National Center for Education Statistics, U.S. Department of Education, NCES 2001-307, *Public Libraries in the United States: Fiscal Year 1998*, Table 7 (2001).

35. *See supra* notes 18-19 and accompanying text. *See also Redefining Film Preservation*, *supra* note 27 § 1 ("The key conclusion of Film Preservation 1993 is that motion pictures of all types are deteriorating faster than archives can preserve them. Film is a fragile medium, intended for brief commercial life. . . .").

images.[36] As this Court explained in *Reno v. ACLU*, the Internet is comparable to "a vast library including millions of readily available and indexed publications." *Reno v. ACLU*, 117 S. Ct. 2329, 2335 (1997). The Internet "was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world." *ACLU v. Reno*, 929 F. Supp. 824, 836 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997). Just as this platform has lifted so-called "public records" out of "practical obscurity" and provided the fodder for controversial new products and services, it offers the chance to bring the creative works housed in the stacks and files of our libraries and archives to the public on a scale that heretofore seemed unimaginable. For example, the public downloads a million copies of ebooks from Project Gutenberg's main server each month.[37] Internet-based digital archives are the true embodiment of the public domain.

Most libraries have a copy of the *Complete Works* of Shakespeare, a few volumes of Plato, two or three of Mark Twain's novels, perhaps a smattering of Dickens. Project Gutenberg offers several editions of Shakespeare, 31 works of Plato, 50 of Twain and 56 of Dickens.[38] Online access to Milton's *Aeropagitica* (Gutenberg #608) or Leonardo Da Vinci's *Notebooks* (Gutenberg # 5,000) is also available. Whether one's taste runs to *Gulliver's Travels* (Gutenberg #829) by Jonathan

36. Panel on Digital Libraries, President's Information Technology Advisory Committee ("PITAC"), *Digital Libraries: Universal Access to Human Knowledge* 21 (2001) page 2, *at* http://www.ccic.gov/pubs/pitac/pitac-dl-9feb01.pdf

37. Project Gutenberg publishes from scores of servers around the world; including over a dozen in the U.S.; thus, the total monthly downloads worldwide are probably several times those downloaded from the main U.S. servers.

38. Sinclair Lewis is represented with four works in Project Gutenberg, but his *Elmer Gantry* (1927) will not be available for another 19 years under the CTEA.

Swift or *The Adventures of Tom Swift* by Victor Appleton (25 volumes), access is easy, no matter how small or underfunded the local library.

Digital film archives provide unique benefits. The analog nature of film means that every viewing of the original work slowly consumes the very film being viewed. The Internet Archive recently borrowed 1,001 key public domain archival films from Prelinger Archives. These films were transferred to videotape, digitized, and published online at http://www.moviearchive.org. Between January 2001 and April 2002 alone, these movie files were downloaded over 1.2 million times by individuals some distance from New York or San Francisco. By contrast, in the entire year 2000, the public only accessed approximately 2,000 physical film clips through Prelinger's designated representatives and held approximately 200 physical access events. Removing the barriers of time and distance digital access allowed the public to view Prelinger's films over 500 times more often than physical access while still preserving the original copies for future generations.

This kind of exponential increase in access is the key to disseminating some of our nation's most influential moments in history. Consider for instance, the Zapruder film, which documents President Kennedy's assassination. Television specials every year license this clip. It is one of the most shocking and important bits of film in American history. Almost every analysis of the assassination of John F. Kennedy depends on the film's contents, just as it requires the Warren report. When will the Zapruder film, like the Warren Report, be available to the public unconditionally?

The importance of these ephemeral films to our society cannot be overlooked. Film is the rare medium of full immersion. Its ability to transport us to distant times and places is unmatched. It imparts intimate knowledge of ourselves as a society and documents our advances and shortfalls in technology, culture, politics, economic, and civil rights. It literally allows us to bear witness. Films provide contemporaneous and visceral exposure

to the real events, feelings, and reactions of Americans during critical moments in our history—the violence in Birmingham, Alabama, Martin Luther King's March on Selma, the Watergate Hearings, and the Tet Offensive influenced the political and moral opinions of millions of Americans.[39] Similarly the images from September 11th 2001 shaped our views of national security, terrorism, and world affairs. Under the CTEA, these works will not be available until 2097. Most of us who witnessed the tragedy will be deceased by the time Americans can view them freely.[40]

As the public domain shrinks, so too does the ability of digital archivists to preserve and provide public access to cultural works. Digital archives can bring the public domain into schools, libraries, and homes across the globe. Indeed, for most works, *only* digital archives could do so.

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39. *See generally* David J. Garrow, *Protest at Selma: Martin Luther King, Jr. and the Voting Rights Act of 1965* (1978) (discussing the influence of television on the politics of the civil rights movement); *see also* http://exchanges.state.gov/education/engteaching/pubs/AmLnC/br40.htm (". . . police violence, shown on national television, sickened the country; within hours, tens of thousands of volunteers were heading south to join King in the march."); Peter Braestrup, *Big Story: How the American Press and Television Reported and Interpreted the Crisis of Tet 1968 in Vietnam and Washington* (1977); Robert J. Donovan and Ray Scherer, *Unsilent Revolution: Television News and American Public Life, 1948-1991* (1992), *excerpted at* http://www.mtr.org/seminars/satellite/civilrights/civil1.htm.

40. *See, e.g.*, Letter dated October 10, 2001, from David K. Allison, Chairman, Information Technology and Society, Smithsonian National Museum of American History, to Brewster Kahle, Founder, Internet Archive, *at* http://www.archive.org/images/smithsonian50pct1.jpg

> Much of the most valuable historical information of our time is being communicated over the Internet and broadcast channels. By developing a systematic and cost effective way to preserve this information in a central repository, you are building an invaluable collection that will serve scholars and the general public for years to come. . . . I can think of no better example of the importance of your work than your capture of the global response to September 11.

C. Digital Archives Support Rich And Diverse Use Of Our Cultural Heritage

Digital archives foster new and innovative use of works in the public domain. For the Prelinger Archives, the transition to digital format created a dramatic increase in public screenings, classroom screenings, individual scholarly research projects, and low-budget productions. Very few if any of these users would have been able to access the archives previously, according to Prelinger.

Digital archives also offer academics and cultural inquisitors the opportunity to exploit highly efficient and productive search tools. The Library of Congress ("LOC") preserves a collection of nearly 121 million items, more than two-thirds of which are in media other than books. Previously, physically searching through the index to this collection, assuming one was able to make the trip to our nation's capital, took days or even weeks. Now, one can simply go to www.loc.gov and search the catalog within minutes.

But many answers needed by researchers lie beyond a title, author or abstract, especially for media other than books. Technologies now exist that allow one to search the actual *contents* of the LOC collection, i.e. the words on the pages, the images on the films, or the sounds on the recordings, from one's home, school, or office computer. Many software programs now include the capability to perform Optical Character Recognition ("OCR"), a process by which the program will allow the user to search the pages of the digitized document for each and every occurrence of a word.[41] The ebooks at Project Gutenberg are already available for search via OCR technology.

Imagine that any child, student, philosopher, reporter, or scholar could simply go to an Internet library the size of the LOC from his or her home or work computer, search for

41. For more information on OCR Technology, *see* Adobe Systems Incorporated, *Adobe Acrobat Capture 3.0*, *at* http://www.adobe.com/products/acrcapture/fullfeature.html

documents in the public domain, and then search and view those documents within a matter of minutes. Imagine that those who are blind or deaf can use tools that translate these works—on the fly—into a format that meets their needs. Imagine that individuals in other countries have the tools to translate these works into their native tongue in real-time. Think of the difference it could make in bringing our cultural heritage to the public and educating the populace. This is where technology and imagination are leading us; this is where the CTEA forbids us to go.

D. Digital Archives Extend Our Cultural Heritage

Beyond preservation and accessibility digital archives provide the public with unprecedented opportunities to use our cultural heritage as the creative basis for the next generation of artistic and informative works.[42] The ability to digitize vastly increases the capacity to incorporate our history and culture into new works. Unlike physical media, digital media allow the average individual to easily quote and cite movies, by clipping and sampling. Such quotation and citation not only augment the quality of scholarly work but also reintroduce older works into present-day popular consciousness.[43]

This ability is made more important—and more powerful—as audio and visual recordings flourish. One can allude to or reference a printed work by quoting a short passage or citing the publication. Visual and auditory media, however, present a far more complex arena for allusion and citation. If one wishes to reference a visual image, it is often necessary, if not essential, to show that image within one's own work, a process made simple by digital archives.

42. *See generally* Jessica Litman, *The Public Domain*, 39 Emory L.J. 965 (1990); David Lange, *Recognizing the Public Domain*, 44 L. & Contemp. Probs. 147 (1981).

43. Businesses recognize the value of their corporate heritage for developing their message and image today. They too are creating digital archives of their creative works. *See* Allison Fass, *Online Archive for Coke Advertising*, N. Y. Times, December 10, 2001.

Recently, the Internet Archive held a filmmaking contest. It asked amateur filmmakers around the world to create a short film of less than 10 minutes showing a perspective on an historical event associated with war. The films could be true stories, parodies or fiction. In creating these films, the Archive asked filmmakers to limit their resources to free content found in archives across the Internet, including the 1,001 films of the Prelinger Archives stored at moviearchive.org. The submissions each conveyed a powerful and timely message about war and society. These new creative works were built exclusively through the use and reuse of public domain digitized film.[44] Submissions came from such diverse participants as a fifth grade class in a District of Columbia public school and an individual in Finland. Such commentary, from such creators, would not have been possible before the advent of digital film archiving.[45]

Similarly, younger generations of Americans immerse themselves in their musical heritage, interacting with it rather than merely reacting to it. An emerging form of music called "mash-up" showcases the creativity of youth through the creation of entirely new songs using only bits of older music—the more eclectic, even odd, the combination the better.[46] Yet, this new

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44. To view the winning film as well as the other submissions, go to http://ftp.archive.org/html/contest01/gallery.htm

45. *See also* Amy Harmon, *"Star Wars" Fan Films Come Tumbling Back to Earth*, N. Y. Times, April 28, 2002, at 2-28. ("When word began circulating on the Internet in December that Lucasfilm would be a co-sponsor of a 'Star Wars' contest for fan-made films, to be judged by George Lucas himself, members of the growing digital underground felt as if the Force was finally with them. 'How cool is this?' read the first of many messages on TheForce.net, the home to more than 50 amateur films inspired by Mr. Lucas's 'Star Wars' series.").

46. *See* Neil Strauss, *Spreading by the Web, Pop's Bootleg Remix*, N. Y. Times Online, May 5, 2002, *at* http://www.nytimes.com/2002/05/09/arts/09MASH.html The desire to interact with music to create a newly meaningful pieces is not only the dominion of the young. Traditional art

(Cont'd)

musical genre suffers under Congress' habitual copyright extensions and the abolition of the formalities. Though a mash-up album by a Belgian group was cited by music executives as one of the best recordings of 2002, the group managed to clear the rights for it only after nine months of work and then only in Belgium, Luxembourg and Holland.[47]

The ability to interact with one's culture to create newly meaningful works is a precious piece of the public's interest in copyright.[48] Authors and other creators should not have to wait

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(Cont'd)
forms such as classical, folk, blues and bluegrass have all benefited from use of old melodies and phrases to create new, fresh sounds. Digital technology, however, gives rise to the promise that culturally important musical derivative works will flourish, as complex combinations are simple and relatively inexpensive to create. Copyright term extensions deprive the young of what older generations of musicians have taken for granted.

47. *See id.*

48. As one copyright scholar stated:

> Artistic freedom to create derivative works from the public domain is a significant public benefit, as shown by musical plays like *Les Miserables*, *Jesus Christ Superstar*, and *West Side Story*, the recent spate of high production quality films based on the works of Shakespeare and Jane Austen, satires like *Rosencrantz and Guildenstern are Dead*, and even literary classics like James Joyce's *Ulysses*.

Denis S. Karjala, *The Term of Copyright, Growing Pains: Adapting Copyright for Education and Society* 7 (1997). *See generally also Recent Derivative Works Based on Frances Hodgson Burnett's Classic* The Secret Garden (1911) *at* http://www.law.asu.edu/HomePages/Karjala/OpposingCopyrightExtension/publicdomain/SecretGardenDWs.html; *Wind Done Gone Suit Settles*, Washington Post, May 9, 2001 *at* http://www.washingtonpost.com/wp-dyn/articles/A63137-2002May9.html; Gregory Maguire, *Wicked: The Life and Times of the Wicked Witch of the West* (1996); Gregory Maguire,

(Cont'd)

nearly a century until copyright has expired to cast "new light" on our cultural heritage. Under the CTEA, such works will only be penned by strangers to the time and place of the original work and not by those alive during the era of its creation.[49]

E. Digital Archives Make Preservation And Access More Economical

Although much is currently done with volunteer labor and donations, digital archiving is not free. Yet because we need only a single digital copy of a work to preserve it in perfect condition for a virtually unlimited duration and for universal use, digital archives make preservation and enhanced access realistic and cost effective.

For example, the costs for physically preserving a single color feature film by copying can run to $40,000 or more, and the short lifespans once thought to be a problem only for nitrate now confront nearly all films.[50] By contrast, the entire cost of digitizing a film is $200 per hour of footage.[51] It is a single cost, paid once per film per lifetime. Once digitized, the cost of storing, maintaining, transmitting and making back up copies of the film approaches

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(Cont'd)

Confessions of an Ugly Stepsister (2000); *Anne Of Green Gables - The Continuing Story at* http://www.anne3.com; Verena Dobnik, *"Lolita" causes a different kind of controversy*, Associated Press, October 10, 1998 *at* http://www.boston.com/news/daily/10/lolita.htm; Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (2001).

49. For example, under the 1909 copyright Act, a child who grew up reading Depression-era literature from the 1930s could expect to write an adaptation of these works by 1970 after the 28 year initial term or by 1990 if the owner had renewed for the 56 year term. Under the CTEA, however, no such adaptation could be written until at least the later 2020s, close to 100 years later.

50. *See Redefining Film Preservation*, *supra* note 27 § 3, ¶ 3.

51. Notes from Interview with Brewster Kahle, Founder, Internet Archive (on file with authors).

zero.[52] Digital files can be maintained, transferred, and backed up automatically by current software without human intervention. Digital archives will cheaply and efficiently save millions of works from dereliction and destruction.[53]

The return on digital archiving is higher still. Federal and state governments continue to spend taxpayer funds to "wire" our schools, libraries, and community centers—to connect them to the Internet.[54] As a nation we have made a commitment to provide a broad swathe of the public with access to this new platform for communication, research, and publishing. But to what have we provided access? If the CTEA stands it will not be the wealth of information and knowledge housed in our cultural institutions. For the rest of this century no new treasures will enter the public domain—they will remain offline and out of reach. We will have given our children the keys to this library, but they will enter only to find half-empty shelves.

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52. The cost estimates for maintaining a digital book range from Michael Lesk's low of $4 to the National Archives and Records Administration (NARA) estimate of $13.99 to Yale University's estimate of $15.37 to the EPA's estimate of $250 per book. *See* Anne R. Kenney, *Digital to Microfilm Conversion: A Demonstration Project, Final Report to the National Endowment for the Humanities*, Tbl 6, *at* http://www.library.cornell.edu/preservation/publications.html

53. For example, the Bibliotheca Alexandria's Digital Manuscripts Library digitizes manuscripts and rare books and makes them available on CDs. *See* http://www.archive.org/news/bibalex_p_r.html

54. For example, the Telecommunications Act of 1996, created the Universal Service Fund for Schools and Libraries (commonly known as the "E-Rate" program), which provides discounts on the cost of telecommunications services, including Internet access and equipment, to all public and private schools and libraries. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 110 Stat. 56 (1996).

CONCLUSION

Digital archives constitute the difference between a nominal public domain and a real, robust public domain. Their growth and maturity depends on limits to copyright. Digital archives are ready to serve the needs of children, researchers, and the public. But they will never get that chance unless Congress is prevented from making copyright protection perpetual. Amici Internet Archive, Prelinger Archives and Project Gutenberg respectfully request this Court to enforce the public's right to preserve and access its heritage by striking down the CTEA as an unconstitutional extension of the copyright term beyond the enumerated powers given to Congress by the United States Constitution.

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Eric Eldred, Et Al.,
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v.
John D. Ashcroft, in his official capacity as
Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTEREST OF THE AMICUS CURIAE

Amicus Malla Pollack[1] ("Pollack") is a law professor with no financial interest in the outcome of this litigation. As an expert in the history of Art. I, Sec. 8, cl. 8 of the United States Constitution, the Copyright and Patent Clause, Pollack hopes to bring to the Court's attention information not clearly presented by any other brief. Pollack believes this information supports a strong standard of review for congressional action pursuant to the Copyright and Patent Clause.

AUTHORITY TO FILE

Counsel for petitioner and respondent have consented to the filing of this brief. The consent letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The review standard for statutes passed pursuant to the Copyright and Patent Clause of the U.S. Const., Art. I, Sec. 8, cl. 8, should be similar to that used for the Enablement Clause of the Fourteenth Amendment, U.S. Const., Amd. XIV, Sec. 5., as explicated in City of Boerne v. Flores, 521 U.S. 507 (1997); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000). Original intent for a high standard of review

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1. No part of this brief was authored by counsel for any party to this case. The cost of this filing has been paid in full by Malla Pollack.

is indicated by the detailed fences inserted into the text of the Copyright and Patent Clause. The importance of these textual fences is supported by the ratifying generation's concern with government corruption and by that generation's understanding of the anti-corruption background of the ancestral Statute of Monopolies. The only other constitutional language with similarly constrained text is the Enablement Clause of several later amendments.

The Court should speak more fully than usual on the constitutional issues in this case, because Congress has ignored this Court's repeated, less clear instructions to prioritize public access to "science and the useful arts."

ARGUMENT

Amicus Malla Pollack ("Pollack") writes separately to bring additional points to the Court's attention. Specifically, Pollack argues (i) that the Court should use a high standard of review under the Copyright and Patent Clause, and (ii) that full analysis is appropriate in this case. On the other issues presented, Pollack fully supports the insightful *amicus* brief filed by Jonathan Weinberg on behalf of numerous law professors.

I. The Copyright and Patent Clause Requires Tight Judicial Review of Congressional Action

This Court has not yet formulated a standard of judicial review for congressional action pursuant to the Copyright Power.[2] The text of the Constitution and the basic policy concerns of the drafting and ratifying generation support a high standard of review.

A. Textual Choices Demonstrate Original Intent for Narrow Construction of the Power

The Copyright and Patent Clause[3] is uniquely drafted. No other grant of power in the original Constitution or the early Amendments is as textually constrained. This drafting decision evidences that all the limitations in the Clause were necessary hedges to cabin the power acceptably.[4]

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2. The Copyright Power and the Patent Power are both contained in Art. I. Sec. 8, cl. 8 of the U.S. Const.

("Congress shall have the power . . . To Promote the Progress of Science and useful Arts by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries."), usually referred to as the Copyright and Patent Clause. The Progress Clause would be more appropriate. *See* Malla Pollack, *What Is Congress Supposed to Promote?: Defining 'Progress' in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing The Progress Clause, forthcoming* 80 Nebraska L. Rev. (2002), now available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304180>. (providing empirical evidence of the 1789 meaning of "progress").

3. Since this case deals solely with copyrights, most later references will be to the "Copyright Power" and "Copyright Clause."

4. "We begin with [the Constitution's] text." City of Boerne v. Flores, 521 U.S. 507, 519 (1997)(providing

First, the Clause includes a jurisdictional limit on the *res* as to which Congress may legislate: only the "writings" of "authors" and the "discoveries" of "inventors."

Second, the Clause specifies that Congress may pass statutes for one, and only one policy goal, "to promote the

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Court's starting place for determining scope of Congress' power under Fourteenth Amendment); *see also, e.g.,* Printz v. United States, 521 U.S. 898, 905 (1997) (Scalia, J.) (looking at history only after explaining the absence of any constitutional text precisely on point); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1236 (1995) (arguing that proper interpretation of the Constitution "put[s] . . . great emphasis upon text and structure, both the structure within the text – the pattern and interplay in the language of the Constitution itself and its provisions – and the structure (or architecture) outside the text – the pattern and interplay in the governmental edifice that the Constitution describes and creates, and in the institutions and practices it propels."); *see also* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999)(calling for "intratextualism" which "tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."). *See generally* Malla Pollack, *Dealing with Old Father William, or Moving from Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act, forthcoming* Loyola of L.A. L. Rev. (Fall 2002) (providing fuller explication of the text-based argument for strong review under Art. I, Sec. 8, cl. 8, the Progress Clause.).

progress of science and useful arts."

Third, the Clause specifies the means Congress may use: providing "exclusive rights" for mere "limited times."[5] The plural "times" does not undermine the extreme narrowness of the Power. "Times" allows for (i) different pre-set terms for different types of statutory rights, and (ii) pre-set terms divided into original and renewal terms.[6] The

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5. Congress may also support the arts and sciences through the Spending Power. *See* National Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998)("Congress has wide latitude to set spending priorities"; upholding facial validity of NEA funding criteria). However, the Necessary and Proper Clause may not be used to "adopt measures which are prohibited by the Constitution" or "pass laws for the accomplishment of objects not intrusted to the government." M'Culloch v. Maryland, 17 U.S. 316, 423 (1819). The Commerce Clause may not be used to by-pass a limit in the text of another Article I power. *See* Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457, 465 (1982) (refusing to allow Commerce Clause by-pass of uniformity limit in Bankruptcy Clause). Nor may the Treaty Power be used by-pass a textual fence blocking Congress' power. *See* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power*, 2000 Univ. of Il. L. Rev. 1119, 1181-82 (explaining).

6. *See* Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyr. Soc'y USA 19, 102 (2002) (supporting same construction). During the era of formalities, most works were not renewed. The effective term limit was, therefore,

bargain theory of intellectual property requires terms to be set *ex ante*.[7] The *quid pro quo* principle, or bargain theory of intellectual property, prevents the type of corruption the Framers recognized in earlier British practice, as discussed *infra* Section I.B.

No other Article One Power is as textually constrained. As a textual matter, therefore, this Court should require Congress to abide by each and every limitation. Respect for the Constitution's writtenness requires strong judicial review.

The Court of Appeals decided the constitutionality of the Copyright Term Extension Act[8] ("CTEA") pursuant to the Copyright Power by the most deferential form of rational

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much shorter than if the entire allowable period was granted in one block of time. *See* Barbara Ringer, Study No. 31: Renewal of Copyright 187 (1960) (concluding only 15% of registered copyrights were renewed), *reprinted in* Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess., Copyright Law Revision (Comm. Print 1960).

7. *See* Heald & Sherry, *supra* note 5, at 1162-64 (locating *quid pro quo* principle embedded in Clause); Pollack, *What is Congress Supposed to Promote?*, supra note 2, at 13-14 (applying bargain theory to copyright); Malla Pollack, *The Owned Public Domain*, 22 Hastings Comm/Ent 265, 291-92 (2000) (providing authorities for bargain theory of patent).

8. Pub. L. No. 105-298, 112 Stat. 2827 (1998).

basis review.[9] The Constitution's text demonstrates the inappropriateness of such lax review. The paradigm of rational basis review is an economic measure of general applicability passed pursuant to the Commerce Clause which is alleged to have violated the equal protection rights of an historically unthreatened group.[10] The Commerce Clause, however, lacks any internal textual restraint on either means or goals. Even the jurisdictional limit of the Commerce Power is both immense and vague. Compare the current "Congress shall have the power . . . to regulate commerce . . . among the several states," with the somewhat narrower hypothetical clause, "Congress shall have the power . . . To promote a civil, agrarian society, by regulating Commerce . . . among the several states." This hypothetical adds only one of the several textual constraints located within the Copyright Clause. A goal is set, but the allowed means are not stated

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9. *See* Eldred v. Reno, 239 F.3d 372, 380 (D.C. Cir. 2001) (holding that Congress' choice of copyright terms "is subject to judicial review only for rationality."); Eldred v. Ashcroft, 255 F.3d 849, 854 (D.C. Cir. 2001)(Sentelle, J., dissenting from denial of petition for rehearing en banc) ("Contrary to my colleagues, I do not accept that it is sufficient for Congress to merely articulate some hypothetical basis to justify the claimed exercise of an enumerated power.").

10. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 3 (2000) (stating that age discrimination claims are subject to mere rational basis scrutiny because "[o]lder persons . . have not been subjected to a history of purposeful unequal treatment.") (citation and internal quotation marks omitted).

even generally. No express time constraint is imposed. In stark contrast, the Copyright Clause specifies a single goal, allows only one tightly cabined means which may be deployed only for "limited times," and provides a sharp jurisdictional limit (only "writings" of "authors" and "discoveries" of "inventors").

In sum, the uniquely detailed text of the Copyright Clause demonstrates that its drafters considered its possible misuse and decided not to allow Congress this power without multiple textual constraints. As a textual matter, therefore, the Copyright Power demands review at a much higher standard than that given mere commercial regulation.

Other basic concerns support a high review standard in the Copyright Clause issue of this case.

First, the review standard is generally raised when the statute in question is *targeted* at the intended area of protection.[11] The CTEA targets the "writings" of "authors." It has no more general applicability.

Looking at the Constitution structurally, the text separates out for unusual constraint congressional power over "writings" and "discoveries." If the only intent had been to allow national treatment of such *res* regardless of interstate connection, the Clause would give "Congress the power . . . to promote writings and discoveries." The textual difference between this hypothetical and the actual language of the

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11. *See, e.g.*, Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 640-41 (1994) ("laws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State and so are always subject to at least some degree of heightened First Amendment scrutiny.") (citations and internal quotation marks omitted).

Copyright Clause demonstrates that copyright statutes should not be treated as mere economic regulation. Madison, after all, saw no need for the First Amendment's speech and press clauses[12] despite his clear understanding that republican government required an educated, informed populace.[13] The Copyright Power is textually limited to force it into its proper role as an "engine of free expression."[14] The Copyright Clause is the pre-First Amendment First Amendment.

In the Constitution, the only textual structure comparable to the Copyright Clause is the enabling language repeated almost verbatim in eight amendments.[15] These

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12. *See* The Federalist Papers (no. 38, James Madison); *see also id.* (No. 84, Alexander Hamilton) ("For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?").

13. *See* Letter from James Madison to W.T. Berry (Aug. 4, 1822), *in* James Madison, The Complete Madison 337 (Saul K. Padover ed. 1953) ("Knowledge will forever govern ignorance"; "[a] popular government without popular information[] or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.").

14. Harper & Row Publ. v. Nation Enters., 471 U.S. 539, 558 (1985).

15. The Second Amendment has what might be a purpose limitation, but it does not grant a power to the federal

clauses give Congress "power to enforce [the amendment] by appropriate legislation."[16]

This Court has recently recognized the independent judicial scrutiny required by this textual formulation. First, this Court emphasized that it, not Congress, defines the Constitution's limiting words.[17] Second, this Court insisted that Congress is limited to enacting legislation aimed at the goal recited in the granted power.[18] Third, this Court

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government and has yet to be fully explicated by this Court. *See* Printz v. United States, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring) (mentioning Court's lack of analysis).

16. U.S. Const. Amends. XIII, XIV, XV, XVIII, XIX, XXIII, XXIV, XXVI. One also gives this power to the States. *See* U.S. Const. Amend. XVIII, sec. 2.

17. "The power to interpret the Constitution in a case or controversy remains in the Judiciary." City of Boerne v. Flores, 521 U.S. 507, 524 (1997); *see also id.* at 519 (basing limitation on Congress' power on words "enforce . . . provisions of this article"); *id.* at 545 (O'Connor, J., dissenting on other gds.) ("Congress lacks the power to decree the *substance* of the Fourteenth Amendment's restrictions on the States.") (citation and internal quotation marks omitted).

18. *See Boerne*, 521 U.S. at 519 ("Congress does not enforce a constitutional right by changing what that right is. . . . Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the

independently checked Congress' factual record.[19] Fourth, this Court held Congress' power is limited to actions both congruent and proportionate with the constitutionally legitimate goal in light of the legislatively gathered facts.[20]

The textual parallels counsel doctrinal similarity.

First, this Court should itself define the constraining phrases: "limited times"[21] and "promote the progress of science and useful arts."[22]

Second, this Court should hold Congress to the one goal allowed by the Clause, "promot[ing] the progress of science and useful arts." Congress has already declared the CTEA primarily aimed at quite different goals:

'provisions of [the Fourteenth Amendment.]").

19. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 89 (2000) ("Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem.").

20. *See Boerne*, 521 U.S. at 520; *Kimel*, 528 U.S. at 644; United States v. Morrison, 529 U.S. 598, 625-26 (2000).

21. *See supra* at p.5 (discussing "limited times").

22. *See* Pollack, *What is Congress Supposed to Promote?*, *supra* note 2, at 28-36, 49-87 (providing empirical evidence on 1789 meaning of "progress").

> The purpose of the [CTEA] is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. . . . [E]nsuring fair compensation for American creators . . . and providing enhanced economic incentives to preserve existing works. . . [23]

Accepting its own portrayal, Congress' two main goals were economic:[24] balance of trade and remuneration to "American creators." Facially, neither of these are intended to "promote[s] the progress of science and useful arts." To the extent the CTEA targets these announced goals, it is unconstitutional *per se*.

Third, promoting preservation of works, the remaining announced goal, must be subjected to some version of proportionality and congruence review based on this Court's independent perusal of the legislative record.[25] While unlabeled, the review level in *Kimel* and *Morrison* is clearly higher than mere rational basis review.[26]

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23. S. Rept. No. 104-315, at 4 (1996)(providing "purpose" of legislation).

24. Whatever the meaning of "promote the progress of science and useful arts," it cannot be either (i) raising the economic value of American copyright-protected goods, or (ii) providing a wealth transfer to certain individuals. The latter needs no explanation. As to the former, economic value is not independent of the legal entitlements granted by statute. *See* Julie Cohen, *Copyright and the Perfect Curve*, 53 Vanderbilt L. Rev. 1799, 1800 (2000). Economic value, therefore, cannot be the meaning of a textual constraint on Congress. Furthermore, Congress had no factual basis for believing a term extension would result in a net economic gain to Americans. Congress had a basis for believing that copyright holders with rights in some works would obtain greater profits. No evidence was introduced, however, about the value (economic or otherwise) of the unlicenced uses that would be blocked by term extension. Nor did Congress consider the greater fees Americans would have to pay for licenses to use non-American works inside the United States for an additional twenty-years. Copyright holders, furthermore, rely extensively on foreign-made copies of American works, thus limiting any American gain in the balance of payments. *See* Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause and the First Amendment*, 17 Cardozo AELJ 47, 94-96 (1999) (discussing fudge of difference between "foreign sales" and "exports" in report submitted to Congress in support of the Digital Millennium Copyright Act).

25. The CTEA is facially disproportionate. The term enhancement is not limited to old works requiring costly (or any) physical repair before dissemination. No exemption is provided for persons who want to repair and disseminate old works but have tried and failed to locate the copyright holders whose permissions are required.

26. *See Kimel*, 528 U.S. at 81-92; *Morrison*, 529 U.S. at

B. Fear of Monopolies and Corruption Support Narrow Construction of the Power

Policy concerns important to the Framers and the ratifying generation support a high standard of review for congressional action pursuant to the Copyright and Patent Clause.

The Copyright and Patent Clause was drafted against the background of the English Statute of Monopolies[27] and

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619-627; *see also* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441, 477 (2000) ("restrictions [in *Morrison*] seem analogous to the narrow tailoring required by strict scrutiny.").

27. 21 Jam. 1, c.3 (1624). One of the exceptions to the Statute allowed grants "concerning printing." *Id.* at § 10. Like monopoly grants over other products, printing privileges were used both to motivate "private" persons to enforce government regulations and to reward Crown favorites indirectly. *See* Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 Southwestern Univ. L. Rev.1, at 92-99 (2000); *see also* Lyman Rae Patterson, Copyright in Historical Perspective 78-113 (1968) (discussing printing patents); Howard B. Abrams, *The Historical Foundation of American Copyright Law*, 29 Wayne L. Rev. 1119, 1147-52 (1983) (same).

the evils it attempted to control.[28] Public concern with "monopolies"[29] was not merely a fear of anticompetative economic behavior. It was a fear of government capture by special interests – in modern terms, "agency failure"; in Madison's diction, "faction"; in Whig rhetoric, "corruption."

During the ratification controversy, monopolies were denounced as the standard pay-off tool of a "corrupt oppressive aristocracy."[30]After all, everyone knew that

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28. *See* Graham v. John Deere Co., 383 U.S. 1, 5 (1966); *see also, e.g.*, Gordon S. Wood, The Creation of the American Republic 1776-1787, at 623 (paperback ed. 1998): Linda Levy Peck, Court Patronage and Corruption in Early Stuart England 220 (1990)(both asserting that fight against early Stuart corruption and related monopolies was central to revolutionary thought.); *see also* Brief Amici Curiae of Tyler T. Ochoa, Mark Rose, Edward C. Waltherscheid, the Organization of American Historians, and H-Law: Humanities and Social Sciences OnLine in Support of Petitioners (providing historical background supporting narrow reading of Copyright Clause).

29. "Monopoly" was a flexible term of disapproval applicable to almost any disliked trade regulation. *See* Pollack, *Purveyance and Power, supra* note 27, at 40-41.

30. George Mason, *The Objections of the Hon. George Mason to the Proposed Federal Constitution. Addressed to the Citizens of Virginia, reprinted in* Pamphlets on the Constitution of the United States 327, 332 (Paul L. Ford ed., 1968). Congruently, the Constitution doubly denies

"[e]xclusive companies are, in trade, pretty much like an aristocracy in government, and produce nearly as bad effects. . . . [S]uch companies . . . always by the greatness of their capital, have an undue influence on government."[31] "Monopolies in trade [may be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of the companies who have an exclusive right, to engross different branches of commerce."[32] As Thomas Paine had warned "the [English] crown is [the] overbearing part [of] the English constitution . . . deriv[ing] its whole consequence merely from being the giver of places and pensions . ..,"[33] places and pensions, furthermore, historically funded by monopolies and related methods of by-passing Parliamentary scrutiny of the

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government power to grant titles of nobility. *See* U.S. Const. Art. I, Sec. 9, cl. 8 (baring federal grants); *id.* at Sec. 10, cl. 1 (baring state grants).

31. Agrippa, 14 *To the Massachusetts Convention, reprinted in* 4 The Complete Anti-Federalist 104, 104-05 (Herbert J. Storing ed., 1981).

32. A Son of Liberty, *reprinted in* 3 The Complete Anti-Federalist 34, 35 (Herbert J. Storing ed., 1981).

33. Thomas Paine, Common Sense, *reprinted in* Thomas Paine, Selected Works of Thomas Paine & Citizen Tom Paine [by] Howard Fast 6, 10 (Modern Library ed. 1946).

royal fisc.[34]

The extent of the fear can only be understood by considering the extent of the corruption. The late Tudor and Early Stuart English monarchs lacked the man-power and revenue to control social and economic behavior through police or administrative agencies. Instead, regulation was imposed and funded indirectly though a maze of monopolies, fees, and special privileges.[35] The Stationers' Company, which controlled printers' claims to "copy-rights," was one such indirect form of rule, a trade guild which supported Crown censorship.[36]

While full figures are unavailable, the Long Parliament claimed that monopolies alone yearly "prejudice'd the subject" by over one million pounds.[37] The leading

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34. See, e.g., Pollack, *Purveyance and Power, supra* note 27, at 51, 56-57, 80-82, 89-92.

35 . *See* Pollack, *Purveyance and Power, supra* note 27, at 20-99, 119-33 (providing detailed explication and support). Corrupt, indirect funding of government services by privatizing those services included fee-paid officials (piece-work employees) and monopolists (independent contractors) *See id.* at 131.

36. *See, e.g,,* Patterson, *supra* note 27, at 114-142 (discussing interaction of Stationers' Company and Crown censorship); Abrams, *supra* note 27, at 1135-38 (same).

37. *The Grand Remonstrance [of 1641], with the Petition Accompanying It, reprinted in* The Constitutional

authority is noted British historian G. E. Aylmer,[38] who specialized in the indirect funding mechanisms of the early Stuarts. Aylmer's educated estimates for yearly intake by officials of the national government *from private citizens* (including fees, gratuities, and gifts, but not bribes) is between £277,000 and £373,000.[39] To put these figures in perspective, the Crown's own annual revenue at the time was about £618,000, out of which the Crown paid these same officials about £350,000 per year.[40] Yet Aylmer's figures of the cost of indirect government administration are much too low – they omit many important scams.[41]

To add insult to injury, these indirect methods of funding did not work well. That is, they did not work well at funding the public welfare-producing government projects

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Documents of the Puritan Revolution, 1625-1660, at 202, 211 (Samuel Rawson Gardiner ed., 3rd ed. rev. 1968).

38. *See especially* G. E. Aylmer, The King's Servants: The Civil Service of Charles I: 1625-1642 (1961) (discussed extensively in Pollack, *Purveyance and Power, supra* note 27).

39. *See* Aylmer, *supra* note 38, at 246 (estimating yearly average for 1620-1640).

40. *See* Aylmer, *supra* note 38, at 248-52, *discussed in* Pollack, *Purveyance & Power, supra* note 27, at 133.

41. *See* Pollack, *Purveyance and Power, supra* note 27, at 133.

they supposedly supported.[42] They did work well at providing financial rewards to Crown favorites without touching the treasury directly.[43]

The Whigs and their political decedents, the American Framers, attempted to control government by limiting government revenue to legislatively approved

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42. *See, e.g.*, Pollack, *Purveyance and Power, supra* note 27, at 31-32 (demonstrating that fee on tavern licenses failed to fund rebuilding of Dover haven); *id.* at 88 (briefly discussing corruption of persons' granted royal permission to enforce various regulatory statutes); *id.* at 91 (mentioning public outcry over failure of both Old Soapers and Clerk of the Market to perform their duties properly during reign of Charles I); *id.* at 120 n.704 (discussing that 1614-17 attempt to increase export of semifinished wool cloth by allowing it to be controlled by Alderman Cockayne almost destroyed England's foreign trade staple); *id.* at 124 n.720 (briefly reviewing horror story of Navy officials becoming rich while allowing ships to rot during reign of James I).

43. *See, e.g.*, Pollack, *Purveyance and Power, supra* note 27, at 32-33 (describing sums collected by officials from suitors to the Court of Wards during Elizabeth I's reign); *id.* at 35-38 (describing officials' take from purveyance system during Elizabeth I's reign); *id.* at 81-82 (summarizing methods used by officials to obtain private profit from royal lands during reign of Charles I); *id.* at 90 (mentioning peculations of £22,000 out of yearly budget of £77,630 for Charles I's household); *id.* at 121 n.705 (listing a few of the persons who used offices to became rich).

taxation, cutting off the hidden pseudo-taxes[44] which allowed Crown administration without representational control.[45] Hence, taxation without representation is tyranny. Hence, the Copyright and Patent Clause was uncontroversial during ratification *because the power was tightly cabined to prevent misuse*. Instead, the anti-monopoly rhetoric was aimed at the textually open Commerce Clause.[46]

In sum, to review copyright statutes with the same deference accorded mere economic regulation betrays the textually recorded policy concerns of the ratifying generation. Congress may be able to give bonuses to favored corporations or industries through the spending power, or tilt

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44. *See* Pollack, *Purveyance and Power*, *supra* note 27, at 132 & nn. 760, 761 (listing several authorities who recognize these costs as tax substitutes).

45. The Statute of Monopolies, at the time of the Framers, and for long afterwards, was famous as the first Whig victory over the royal prerogative during the fight for representational control of government and government finance. *See* Charles Howard McIlwain, Constitutionalism Ancient and Modern 138 (1940); Pollack, *Purveyance and Power, supra* note 27, at 2-7, 67-68.

46. *See* Malla Pollack, *The Multiple Unconstitutionality of Business Method Patents: Common Sense, Congressional Consideration, and Constitutional History*, 28 Rutgers Computer & Tech. L.J. 61, 108-18 (2002) (reviewing discussion of monopolies during constitutional ratification and drafting of the Bill of Rights); *see also*, Pollack, *Purveyance and Power*, *supra* note 27, at 99-116 (same).

Commerce Clause based administrative agencies into pro-big business postures, but it cannot hide such subsidies behind "public interest" copyright statutes. The Copyright Clause was carefully drafted to curtail exactly this option – the hidden pay-off tool of a corrupt, oppressive aristocracy.[47]

II. The Court Should Provide Clear Guidance to Congress

This Court's usual reticence on constitutional issues[48] is unsuitable for this case.

First, giving full deference to Congress' as a co-equal branch of government, Congress cannot follow the Constitution without this Court's teaching on what the document means. This Court has yet to explicate the Copyright Power— a Power which has reached enormous importance. Congress needs this Court's guidance.

Second, Congress has not responded to this Court's repeated statements that the Copyright and Patent Clause's purpose is to increase public access to knowledge and technology.[49] This Court has attempted to create a soft-

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47. Mason, *supra* note 30.

48. *See* Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (listing situations in which Court should decline to reach constitutional issues).

46. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574-76 (1994); Fogarty v. Fantasy, 510 U.S. 517, 526 (1994); Feist Publications, Inc. v. Rural Tel. Svc. Co., 499 U.S. 340, 349, 354 (1991); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146-48, 150, 151,

voiced dialogue. Since Congress has not listened, this Court should raise its voice to be heard.

Third, the current burgeoning of copyright-holder and patent-holder rights to exclude is fueled by what the Framers' and ratifiers of the Constitution would term "corruption," Madison would name "faction," and law and economics scholars would call "agency failure." Mere political process is institutionally incapable of motivating Congress to act in the public interest regarding the scope of intellectual property.[50] Perhaps such action is allowable normal politics

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157, 164-65, 167 (1989); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558, 563, 580, 589 (1985); Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984); Kewanee Oil Co. v. Bicron Crop., 416 U.S. 470, 480-81, 484 (1974); Goldstein v. Ca., 412 U.S. 546, 546, 555 (1973); Lee v. Runge, 404 U.S. 887, 890-93 (1971); Graham v. John Deere Co., 383 U.S. 1, 5-6, 9, 10 (1966); Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 155 (1951); Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (1932); Ware v. Winsor, 62 U.S. (21 How.) 322, 327-29, 330 (1858); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 654, 668 (1834); Shaw v. Cooper, 32 U.S. (7 Pet.) 292, 310 (1833); Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 13, 19, 21 (1829).

See, e.g., Dennis Karjala, *Copyright Protection of Operating Software, Copyright Misuse, and Antitrust*, 9 Cornell J.L. & Pub. Pol'y 161, 181-82 (1999)(discussing Congress' inability to lower copyright holders' entitlements); Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 Berkeley Tech. L.J. 529, 532 (2000) (recognizing Congress' institutional problems in protecting

in other areas of federal regulation, but the Copyright and Patent Clause was written in reaction to similar corrupt English practices. In this one Clause, if nowhere else in the Constitution, the Framers clearly intended to disallow special interest legislation. This Court should so-instruct Congress.

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the pubic domain as the major catalyst of constitutionalization of copyright scholarship); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 Or. L. Rev. 19 (1996)(detailed discussion of collective action failures); Jessica Litman, *Copyright Legislation and Technological Change*, 68 Or. L. Rev. 275 (1989)(same); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1, 86 n.278 (2001)(summarizing collective action failure); William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 Cardozo AELJ 139 (1996) (discussing personal experience with congressional response to special interests). Assuming that the willingness to spend large sums on lobbying signals a request in the public's economic interest is irrational. *See, e.g.*, Richard E. Baldwin & Frederic Robert-Nicoud, *Entry and Asymmetric Lobbying: Why Governments Pick Losers*, Nat'l Bur. of Econ. Res. Working Paper No. W8756 (asserting groups in economic decline spend more on lobbying) *available at* <http://www.ssrn.com> (visited Feb. 7, 2002), or from authors at baldwin@hei.unige.ch; f.l.robert-nicoud@lse.ac.uk; Akira Okada & Arno Riedl, *Reciprocity, Inefficiency and Social Exclusion: Experimental Evidence*, Tingergen Inst. Discussion Paper No. TI 99-044/1 (asserting exclusive coalitions result in large efficiency losses) *available at* <http://www.ssrn.com.> (visited Feb. 28, 2002).

CONCLUSION

For all the reasons discussed above, this Court should both (i) use a heightened standard of review for the Copyright Clause issues, and (ii) fully explicate the requirements imposed by the Clause.

Respectfully submitted:
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IN THE
Supreme Court of the United States

ERIC ELDRED, ET AL.,
Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF JACK M. BALKIN, YOCHAI BENKLER, BURT NEUBORNE, ROBERT POST, AND JED RUBENFELD AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, the undersigned submit this brief as *amici curiae*, pursuant to Rule 37 of the Rules of this Court.

Amici are teachers and students of constitutional law and the First Amendment who are concerned with its application to copyright. They are Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School; Yochai Benkler, Professor of Law, New York University School of Law; Burt Neuborne, John Norton Pomeroy Professor of Law, New York University School of Law; Robert Post, Alexander F. and May T. Morrison Professor of Law, Boalt Hall School of Law at the University of California, Berkeley, and Jed Rubenfeld, Robert R. Slaughter Professor of Law, Yale Law School. *Amici* submit this brief *pro se*, representing no institution, group, or association.[1] Their sole purpose is to urge the Court to clarify that Congress's exercise of its power under Article I, Section 8, cl. 8 ("the Exclusive Rights Clause") is subject to the limits on congressional power imposed by the First Amendment.

Amici believe that copyright legislation, like all other congressional legislation, is subject to First Amendment review by the courts. While copyright legislation will ordinarily meet the requirements of the First Amendment because the policies underlying the Exclusive Rights Clause carry significant constitutional weight (especially when ameliorative doctrines such as the idea/expression dichotomy and the fair use doctrine ease

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the tension between copyright and the First Amendment), that fact cannot justify the creation of a new categorical exception that immunizes copyright legislation from all First Amendment review. Where, as here, Congress, responding to the arguments of powerful copyright owners, acts to expand copyright protection dramatically at the expense of speech in the otherwise unregulated public domain, Congress's handiwork must be subject to traditional First Amendment scrutiny.

SUMMARY OF ARGUMENT

The Court of Appeals for the District of Columbia appears to have taken the extraordinary step of categorically immunizing copyright legislation from First Amendment review. "[C]opyrights," the appeals court held, "are categorically immune from challenges under the First Amendment." ***Eldred v. Reno***, 239 F.3d 372, 375 (D.C. Cir. 2001). "[W]e reject [plaintiffs'] first amendment objection to the CTEA ***because the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others***." *Id.* at 376. (emphasis added)

This is indefensible doctrine. Copyright law is not aimed at conduct that incidentally affects speech. It is explicitly designed to regulate the marketplace in expression. Its purpose is to suppress disfavored expression—deemed derivative or imitative—in order to enhance other expression—deemed original and creative. Although a judgment to protect originality at the expense of derivative expression may be justifiable, there is no doubt that such a judgment blocks the dissemination of much valuable speech. ***See, e.g., Estate of Martin Luther King Jr., Inc. v. CBS, Inc.***, 194 F.3d 1211 (1999) (preventing CBS from using in a documentary its own footage of the "I Have A Dream" speech, in deference to King's copyright in

the speech). Thus, although a speaker's use of copyrighted expression may constitutionally be regulated by appropriate copyright legislation, a speaker's desire to publish such expression clearly raises cognizable First Amendment issues.

The Court of Appeals advanced its unorthodox doctrine in order to insulate the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 301-304), from First Amendment review. The court held that the constitutionality of copyright legislation, including a dramatic and retroactive extension of its temporal scope, was immune from judicial scrutiny under the First Amendment. This holding is unprecedented. It effectively creates a category of unprotected speech that is wholly defined by Congress free of judicial review.

The category of unprotected speech created by the Court of Appeals differs from other categories of unprotected speech, like obscenity or fighting words. Legislation attempting to regulate obscenity or fighting words is always subject to judicial review to determine whether the relevant constitutional standards have been upheld. But the Court of Appeals would prohibit analogous review of copyright legislation, because it holds that speakers do not possess any First Amendment interests in publishing copyrighted expression. The Court of Appeals even refused to consider the First Amendment implications of the retroactive application of the CTEA—a provision unlikely to survive a minimal requirement that it be rationally related, much less narrowly tailored, to the constitutional mandate of copyright legislation to "suppl[y] the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

Copyright legislation cannot be said to be exempt from First Amendment review merely because it is enacted pursuant to the specific authorization of the Exclusive Rights Clause. All congressional legislation is enacted pursuant to constitutional authorizations of power, and yet all such legislation must meet First Amendment standards. It is not surprising, therefore, that the reasoning of the Court of Appeals flatly contradicts this Court's ruling in *Harper & Row*. In *Harper & Row*, the Court expressly referred to fair use and the idea/expression dichotomy as "First Amendment protections . . . embodied in the Copyright Act[.]" 471 U.S. at 560. These doctrines could not be "First Amendment protections" if individuals had no "cognizable first amendment right to exploit the copyrighted works of others."

The reasoning of the Court of Appeals is unsustainable even if it is narrowly interpreted to mean that the only limitations on copyright legislation imposed by the First Amendment are the idea/expression dichotomy and the fair use doctrine. To hold that the idea/expression dichotomy and the fair use doctrine are constitutionally mandated is to concede the necessity of First Amendment review to determine if a copyright statute has adequately met constitutional standards.

Because copyright law imposes selective prohibitions on communication, often at the expense of significant public discussion, it should be subject to heightened First Amendment scrutiny. This was the approach recently taken by the Court of Appeals for the Second Circuit in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), which upheld Section 1201(a)(2) of the Copyright Act only after carefully subjecting that provision to heightened First Amendment

scrutiny, *id.* at 454-55, applying the standard of review established by this Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994) ("*Turner I*").

At this stage of the proceedings, however, the Court need not consider whether the CTEA satisfies heightened First Amendment scrutiny. The sole issue necessarily before the Court is the correctness of the refusal of the Court of Appeals to subject the CTEA to any First Amendment review. *Amici* respectfully suggest, therefore, that the Court vacate the decision below and remand to permit the Court of Appeals to review the CTEA under the heightened First Amendment scrutiny appropriate for laws specifically aimed at selectively regulating expression. The justifications advanced by Congress to support the CTEA are so very weak that they are unlikely to survive even moderately elevated scrutiny.

ARGUMENT

I. The Decision Below Creates a New and Unusually Expansive Categorical Immunity from Judicial Review for Copyright Legislation

The court below appears to have taken the unusual step of substantially immunizing an entire area of congressional legislation from First Amendment review. "[C]opyrights," the Court of Appeals held, "are categorically immune from challenges under the First Amendment." *Eldred*, 239 F.3d at 375. The court dismissed petitioners' First Amendment challenge to the CTEA on the grounds that "*the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others.*" *Id.* at 376. (emphasis added)

If the Court of Appeals meant what it said, then it has single-handedly created an entirely new category of unprotected speech. By holding that copyright statutes are immune from First Amendment review, it has effectively ceded to Congress the authority to enact whatever copyright legislation it chooses. The only possible justification for this remarkable holding is that copyrighted expression is, like obscenity or fighting words, categorically without First Amendment protection. But this conclusion is implausible, to say the least.

Copyrighted expression frequently lies at the core of protected speech. To pick a simple example, it would plainly be protected speech to publish a new edition of *Uncle Tom's Cabin*, a work that was once copyrighted but is now in the public domain. There is nothing intrinsic about the words of the novel that, like obscenity, deprives them of First Amendment protection. A speaker's First Amendment interest does not suddenly vanish merely because she chooses to express herself in words that happen to protected by copyright. Alice Randall, for example, who is the author of a book entitled *The Wind Done Gone*, had an obvious First Amendment interest in using elements of *Gone With the Wind* to retell the novel from the perspective of a slave, even though *Gone With the Wind* was still under copyright. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

Recognizing that Alice Randall has a First Amendment interest in publishing *The Wind Done Gone* does not imply that the First Amendment gives her license to ignore the requirements of a valid copyright statute. At issue in this case, however, is not whether, despite countervailing First Amendment interests, copyright law can constitutionally regulate expression, but rather whether

Congress is utterly unrestrained by the First Amendment when it enacts copyright legislation.

The implausibility of the Court of Appeals's conclusion can be seen by imagining a civil rights group seeking to publish an annotated version of *Uncle Tom's Cabin* in 1963 in celebration of the centennial of the Emancipation Proclamation. The publication of such a book would manifestly lie at the very core of speech properly protected by the First Amendment. Because the annotated book would constitute neither a fair use nor solely the appropriation of an "idea," its publication in 1963 would be permissible only because the original copyright of *Uncle Tom's Cabin* had expired in the late 19th century. Yet had the Reconstruction Congress shared the judgment of the 105th Congress and retroactively extended the term of copyright to life of the author plus 70 years, *Uncle Tom's Cabin* would still have been under copyright in 1963. The Court of Appeals would have us believe that in such hypothetical circumstances the civil rights group would have had ***no cognizable First Amendment interests*** in publishing the annotated edition.

The theory of the Court of Appeals implies that the boundaries of constitutionally protected speech expand or shrink as Congress decides the length and breadth of copyright protection. This implication is surely constitutionally backwards. First Amendment rights restrain congressional enactments, not the reverse.

The theory of the court below is so implausible that it is tempting to assume that the court could not possibly have meant what it said. But its words were explicit, and, more importantly, the Court of Appeals utterly refused to evaluate the CTEA in light of relevant First Amendment standards. The circuit court's express formulation places

expression that uses copyrighted materials in a shrinking group of categorically unprotected speech—like obscenity and fighting words. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The modern Supreme Court has, however, recognized that categorical exceptions to the First Amendment often substitute labels for analysis, and that they therefore risk diluting the judiciary's constitutional duty to subject restrictions of free expression to exacting scrutiny. Compare, *e.g.*, *Beauharnais v. Illinois*, 343 U.S. 250 (1952), with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Valentine v. Chrestensen*, 316 U.S. 52 (1942), with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (commercial speech). Indeed, this Court has recently declined to create a new categorical exception to the First Amendment for electronic images depicting offensive sexual behavior by children. *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (April 16, 2002).

Most importantly, this Court has refused to permit states to regulate even the shrinking group of categorical exclusions to First Amendment protection without subjecting such regulations to appropriate constitutional scrutiny. This is because the definition of categorically unprotected speech is for courts to decide on the basis of their understanding of relevant constitutional standards. Thus legislation regulating obscenity is subject to judicial review to determine whether legislative definitions accord with constitutional requirements. *See Miller v. California*, 413 U.S. 15, 23-24 (1973) ("We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited."); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); See *Ashcroft v. Free Speech Coalition, supra*. Similarly, the categorical exception for "fighting words" does not accord automatic

immunity to laws purporting to regulate them; courts must still determine if a statute only regulates that which may properly be regulated. See *R.A.V.*, 505 U.S. at 385-6.

The theory adopted by the Court of Appeals, however, proposes a category of unprotected speech that is not defined by this Court, but by Congress. The court below held both that there are no cognizable First Amendment rights to publish expression that has been copyrighted, and that the scope and provisions of copyright statutes are exempt from First Amendment review. This goes far beyond any First Amendment decision ever adopted by this Court. The Court of Appeals may well have been concerned to construct a theory that would prevent every copyright infringement suit from turning into a constitutional case. But the court constructed a doctrine that is plainly overreaching, for the doctrine prohibits not merely constitutional challenges to the application of otherwise valid copyright statutes, but also to the constitutionality of copyright statutes themselves.

The very point of the reasoning of the Court of Appeals was to preclude First Amendment challenges to the constitutionality of the CTEA. The court stated that "*[t]he works to which the CTEA applies,* and in which plaintiffs claim a first amendment interest, *are by definition under copyright*; that puts the works on the latter half of the 'idea/expression dichotomy' and makes them subject to fair use. *This obviates further inquiry under the First Amendment*." *Eldred,* 239 F.3d at 376. (Emphasis added.) The works are "by definition" under copyright, however, only because Congress chose to define them so. And the First Amendment inquiry "obviated" is the inquiry into whether or not that congressional definition was itself justifiable in terms of the First Amendment.

The Court of Appeals might have been tempted to accord to copyright legislation an extraordinary exemption from First Amendment review because such legislation is authorized by a special empowering clause of Article I. But this argument proves too much, because *every* congressional statute must be enacted pursuant to a constitutional grant of power. Nor can it be that congressional legislation requires less scrutiny under the Bill of Rights when it derives from a narrowly specified power, rather than a broad power. Congress cannot abrogate the fifth and sixth amendment rights of those accused of piracy on the high seas, simply because the Constitution specifically authorizes Congress to punish piracy in Article I, Section 8, cl. 10.

The Exclusive Rights Clause is one of the few empowering clauses that this Court has unanimously held for over 100 years expressly to include substantial constraints on how it can be used. See *Trade-Mark Cases*, 100 U.S. 82, 94 (1879); *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966) (the clause "is both a grant of power and a limitation"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989); *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349-51(1991). The existence of these constraints, however, does not justify immunizing copyright legislation from First Amendment scrutiny. This Court has, for example, interpreted the Bankruptcy Clause, Article I, Section 8. cl. 4, expressly to constrain Congress by requiring it to enact bankruptcy laws that are nationally uniform. See *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982). No one would argue that because the power to enact bankruptcy laws is explicitly circumscribed, such laws are immune from judicial scrutiny to determine whether, for example, they take property without compensation. Similarly, the fact that the Constitution particularly

circumscribes the power of Congress to grant what was at the time of its framing understood as a monopoly[2] is no reason to grant Congress special immunity when it regulates expression under this particular power.

II. The Categorical Exclusion Proposed by the Court of Appeals is Based on a Misconstruction of *Harper & Row*

The Court of Appeals based its unusual exception to First Amendment law on a misreading of this Court's precedent in *Harper & Row*. In particular, the Court of Appeals interpreted this Court as holding that copyrighted speech was without First Amendment protection when it stated that "[C]opyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556 (internal quotation marks omitted).

In *Harper & Row*, the Nation Magazine asked the Court to create a special First Amendment exception to copyright law for news reporting that used copyrighted materials. The Court refused, concluding, "we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright." *Harper & Row*, 471 U.S. at 560.[3] There was no need, the

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[2] See Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1, 54-56 (1994).

[3] Elsewhere the Court characterized the argument it rejected in these terms: "the fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication." *Harper & Row*, 471 U.S. at 557.

Court held, to create such a *special* First Amendment exception to the scope of copyright law "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use. . . ." *Id.*

The actual holding of *Harper & Row,* therefore, was exactly the inverse of the interpretation adopted by the Court of Appeals. This Court did not hold that users have no "cognizable First Amendment right to exploit the copyrighted works of others." Quite to the contrary, it characterized specific components of copyright law, like the fair use doctrine, as "First Amendment protections."[4] Fair use could not function as a "First Amendment protection" unless someone who could claim its benefit had a cognizable First Amendment interest in publishing otherwise copyrighted expression.

Far from implying that copyright legislation is immune from First Amendment review, therefore, *Harper & Row* actually holds that copyright legislation must be subject to constitutional review to determine if it maintains a proper balance between freedom of speech and the promotion of expression. At a minimum, it is clear that the doctrines expressly identified by this Court—fair use and the idea/expression dichotomy—cannot be repealed or

[4] *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994) (evaluating eligibility of a potentially infringing work to be treated as a parody and a fair use by quoting with approval the statement that "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.") (quoting *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 280 (SDNY 1992) (Leval, J.)).

substantially weakened without passing First Amendment scrutiny.

Perhaps, however, the Court of Appeals merely meant to hold that the CTEA did not raise a First Amendment question because it modified neither the fair use doctrine nor the idea/expression dichotomy. On this interpretation, the Court of Appeals implicitly held that fair use and the idea/expression dichotomy *exhaust* the First Amendment protections embodied in copyright law, so that the First Amendment would have no relevance to any other provision in a copyright statute that altered the boundary between the public domain and copyrighted speech.

It is implausible to assume, however, that the First Amendment would touch copyright only at the points of fair use and the idea/expression dichotomy. Compare the First Amendment burden of the following two hypothetical statutes. First, imagine that the Third Congress had retroactively extended the term of copyright protection to a thousand years, thereby prohibiting unauthorized annotations of core documents from the Federalist Papers to *Uncle Tom's Cabin*. Second, imagine a contrasting statute that eliminates the fair use doctrine as to news reports, but that shortens the duration of copyright in such reports to 24 hours. There is no reason why the latter statute should be subject to First Amendment review, while the former should receive no First Amendment scrutiny at all.

Copyright legislation is subject to First Amendment review so as to ensure that public discourse is not unduly damaged by such legislation. Modifications of the idea/expression dichotomy and the fair use doctrine do not exhaust the damage that copyright legislation can inflict on public discourse. This Court's mention in *Harper & Row*

of fair use and the idea/expression dichotomy was thus not intended to be exhaustive, but merely to list the two copyright doctrines that were relevant to First Amendment issues in that case. As the Court of Appeals for the Eleventh Circuit in ***SunTrust Bank*** recently put it, "the balance between the First Amendment and copyright is preserved, ***in part,*** by the idea/expression dichotomy and the doctrine of fair use." 268 F3d at 1263 (emphasis added). Fair use and the idea/expression dichotomy merely ensure that "courts ***often*** need not entertain related First Amendment arguments in a copyright case." ***Id.*** at 1265 (emphasis added).

The recognition in ***SunTrust Bank*** that the idea/expression dichotomy and fair use doctrine are significant, but not exclusive, elements of the balance between copyright and the First Amendment, is plainly correct. The idea/expression dichotomy cannot provide comprehensive protection to public discourse, because the First Amendment safeguards specific modes of expression, not merely abstract ideas. As this Court stated in ***Cohen v. California,*** 403 U.S. 15 (1971) "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." ***Id***, at, 26. Requiring a critic of the Walt Disney Company to write a scholarly article or an editorial rather than publish a cartoon of Darth Vader sporting Mickey Mouse ears is no different than requiring Paul Cohen to write "I object to the draft." The idea/expression dichotomy cannot, then, play the definitive role that the court below attributed to it. It is an important mechanism to avoid conflict with the First Amendment, but only when the infringing expression is not an integral part of the speaker's message.

Although the fair use doctrine likewise provides important mitigation of the First Amendment burdens imposed by the Copyright Act, it too fails to provide comprehensive First Amendment protection. The doctrine does preserve some freedom of expression for users, but it ultimately remains bounded by the government's interest in providing owners with incentives. The First Amendment, however, may require that this interest be weighed against the relevant costs to freedom of expression in ways that the doctrine of fair use does not admit. A new annotated edition of ***Gone With the Wind***, for example, can play an important role in political discourse even though the edition may utilize too much of the original to enjoy the protection of fair use. If Congress extended the copyright period for ***Gone With the Wind*** to such an extended length of time that the copyright could no longer be said to contribute to the incentives for the novel's creation, surely a First Amendment question would be raised about the suppression of the publication of even such a "derivative" book.

It follows that statutory provisions establishing the temporal reach of copyright must be subject to judicial review to determine whether such provisions meet relevant First Amendment standards. Neither the idea/expression dichotomy nor the doctrine of fair use necessarily render copyright legislation compatible with the constitutional requirements of freedom of expression.

III. Legislation That Substantially Expands Copyright Should Be Subject to Heightened First Amendment Scrutiny

The Copyright Act is a statute that regulates speech. It tells some people that they cannot print or publicly present certain words or images. It is not a law aimed at

general conduct that has incidental effects on expression—like a trespass statute or an anti-littering ordinance. It is a law aimed *solely* at expression. It is not a time, place, and manner regulation intended to effectuate non-speech-related purposes.[5] Its entire purpose and effect is to regulate the production of information, culture, and knowledge. It selectively prohibits printing, publishing, and public expressive performance or display. To paraphrase this Court, if the regulation of printing, publishing, or public performance of materials one deems interesting or evocative is not regulation of pure speech, it is hard to imagine what would be. *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). Such regulation requires elevated scrutiny.

Copyright legislation has traditionally been justified in relation to the First Amendment as providing "the engine of free expression." *Harper & Row*, 471 U.S. at 558. This Court has in the past considered legislation with analogous justifications. The cable "must-carry" rules, for example, were justified as facilitating the availability of information "from diverse and antagonistic sources." *Turner I*, 512 U.S. at 663-64; *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 192 (1997) ("*Turner II*"). But just as in *Turner* the Court found it necessary to review congressional legislation to ensure that it indeed advanced its goal of facilitating diverse discourse, so too must courts review copyright legislation to assure that it also actually functions

[5] "[I]n the context of intellectual property, [the] 'no adequate alternative avenues' test does not sufficiently accommodate the public's interest in free expression. Intellectual property, unlike real estate, includes the words, images, and sounds that we use to communicate. . . . Restrictions on the words or images that may be used by a speaker, therefore, are quite different than restrictions on the time, place, or manner of speech." *Cardtoons, L.C. v. Major League Baseball Players Ass'n.*, 95 F.3d 959, 971 (10th Cir. 1996) (citations omitted).

as an engine of free expression rather than as a vehicle of censorship.

We agree, of course, that ordinary copyright litigation should not be transformed into a First Amendment battlefield. The central lesson of *Harper & Row* is that the First Amendment should not normally be understood as constraining the application of generally valid rules in run-of-the-mill copyright cases. There is an important distinction, however, between using the First Amendment to review the constitutionality of copyright legislation, and using the First Amendment to second-guess the application of otherwise valid copyright laws. When *Congress* enacts legislation that imposes burdens on speech, even for the purpose of promoting benign ends, courts must review the legislation to ascertain its constitutionality. But when *courts* enforce the terms of otherwise valid copyright statutes, they can be presumed to incorporate relevant First Amendment considerations into their application of the legislation. See *SunTrust Bank*, 268 F.3d at 1265. ("As we turn to the analysis required in this case, we must remain cognizant of the First Amendment protections interwoven into copyright law.") For this reason, no special additional First Amendment review is necessary in ordinary cases involving the application of otherwise valid copyright law.

Fundamental modification of copyright legislation, by contrast, does require judicial scrutiny. Elevated First Amendment review is especially necessary when Congress acts to modify those components of copyright law that serve to avoid conflict with the First Amendment—components like the idea/expression dichotomy, the fair use doctrine, or the eventual availability of works in the public domain. Fundamental modifications of these components are not frequent. As Senator Hatch recognized in

introducing the predecessor bill that eventually evolved into the CTEA, "it is a rare occasion when we address the fundamental aspects of copyright protection." 141 Cong. Rec. S3390 (March 2, 1995). But the Senator well recognized that the extension he proposed would introduce precisely such a fundamental change. *Id.*

When Congress acts to alter the basic balance between copyright legislation and the First Amendment, this Court should at a minimum apply the same level of review that it applies to other laws that directly regulate speech in the name of improving the flow of information in society. The "must-carry" rules for the cable industry are an apt analogy. See *Turner I.* Applying *Turner*, congressional efforts to modify the major components of copyright law must at the very least actually serve the government's interest in supplying "the economic incentive to create and disseminate ideas," *Harper & Row*, 471 U.S. at 558, and they must do so in a manner that is no more restrictive than necessary. *Turner I*, 512 U.S. at 662.

It should be stressed that heightened judicial scrutiny is even more important in the context of copyright legislation than it was in the context of *Turner* and the other media regulation cases in which the *Turner* test has been applied.[6] Judicial review is especially significant when the political process is systematically deformed, so that it is unlikely to weigh all the interests affected by legislation. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), John Hart Ely, *Democracy and Distrust* (1980). Copyright legislation exemplifies the potential for such structural distortion.

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[6] *See, e.g., Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

In the context of ordinary media legislation, both the parties burdened and the parties benefited are usually well represented in the political process. For example, both the cable carriers who suffered the burden of the must-carry rules at issue in the *Turner* litigation, and the broadcasters who benefited from those rules, fully participated in the political process that produced the relevant regulations. Copyright legislation, by contrast, is not typically enacted with the benefit of such full and representative political participation. The ***benefits*** of copyright legislation accrue to the current owners of copyrights, who accordingly have every incentive to advance their present and palpable interests. But the ***burdens*** of copyright legislation are usually imposed upon diffuse members of the public, and most especially upon those who are not yet born or who are too young to articulate their interest in a copyright law that would more effectively protect their freedom of expression by shortening the duration of the copyright period. Opposition to copyright legislation is thus not fully representative.

The CTEA is a quintessential example of the kind of rent-seeking statute one would expect to result from this structural distortion. Retroactive extension of copyright in particular provides an immediate windfall for the owners of aging copyright inventories. Unsurprisingly, therefore, the Chief Executive Officer of Disney was described as being quite explicit about the importance of the CTEA to his company when he visited the Majority Leader of the Senate a week before the latter co-sponsored the bill. *See* Alan K. Ota, ***Disney in Washington: The Mouse That Roars***, Congressional Quarterly (August 8, 1998), 2167. Copyright owners were heavily represented in committee hearings in both houses, counterbalanced only by a rare academic voice. See 144 Cong. Rec. S11672-73 (Oct. 7, 1998); H. R. Rep. No. 105-452 at 5 (1998). The bill itself

was enacted in a single day—discharged by the Committee on the Judiciary, passed by the Senate by Unanimous Consent, considered by the House under suspension of the rules and agreed to by voice vote, all on October 7, 1998.

Although the benefits of copyright extensions to discrete industries are palpable and concrete, the costs of such extensions to future users are diffuse and intangible. Alice Randall, author of ***Wind Done Gone***, was but a child when the term of protection for ***Gone With the Wind*** was first extended, long before she could imagine that the extension would allow a district court to ban her book fifty-two years after Margaret Mitchell's death. See ***SunTrust Bank v. Houghton Mifflin Co.***, 136 F. Supp. 2d 1357 (N.D.Ga. 2001), ***reversed***, 268 F.3d 1257 (11th Cir. 2001). Her case is far from unique. Most potential users of copyrighted works rarely appreciate that their speech will be curtailed in a generation or more by a presently enacted statutory expansion of the Copyright Act. Predictably, therefore, opposition to the CTEA was confined to a smattering of academics and librarians, whose job it is to consider remote and diffuse consequences of legislation.

Copyright legislation typically produces such systematic structural distortions of the political process, and these distortions will always skew copyright legislation towards ever-increasing protection, with only occasional exemptions where specific harms are directly borne by cohesive interest groups such as broadcasters, cable operators, or software producers. Because copyright legislation restricts the fundamental right to communicate, elevated judicial scrutiny is required to ensure a proper balance between the state's interest in promoting copyrighted expression and the public's interest in freedom of expression.

In the procedural context of this case, the Court need not decide the precise level of applicable scrutiny to apply to the CTEA. In *Turner II*, this Court seemed to embrace the proposition that intermediate scrutiny was required in the context of a congressional statute seeking to further expression by differentially burdening the speech rights of distinct parties. *Harper & Row* describes copyright law in exactly these terms. While copyright law serves as "the engine of free expression" "[b]y establishing a marketable right to the use of one's expression," *Harper & Row*, 471 U.S. at 558, it also burdens speech in ways that must be mitigated by "First Amendment protections already embodied in the Copyright Act." *Id.* at 560.

Although *Turner II* suggests that a form of intermediate scrutiny should be applied to the CTEA, this Court need not now decide the precise level of scrutiny applicable to the different settings that might arise in the context of copyright legislation. The level of review appropriate to this case might best be left in the first instance to the Court of Appeals. All that is necessary at this stage in the litigation is to hold that copyright legislation should not be categorically immune from First Amendment review, and should be subject to some degree of elevated scrutiny.

IV. The Categorical Exclusion is Necessary to the Holding Below, as the CTEA is Unlikely to Survive Any Degree of Close Scrutiny

Were this Court to remand to the Court of Appeals with instructions to apply some form of elevated scrutiny to the CTEA, the statute would in our judgment be highly unlikely to survive. The statute was upheld by the Court of Appeals only because it utterly refused to apply any First Amendment review at all.

The CTEA extends the term of copyright from life of the author plus fifty years, to life of the author plus seventy years, or, where the copyright is initially vested in a corporation, from seventy five to ninety five years. *See* Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998). It does so not only prospectively, but retrospectively as well. *See Id.* § 102 (b) & (d).

Had the Court of Appeals subjected the CTEA, in particular its retrospective application, to elevated First Amendment review, it is highly unlikely that important aspects of the statute would have been upheld. The justification for the Act is substantially weaker than that of other statutes which have been held unconstitutional, or which, though upheld, were understood to have presented hard cases.[7] The CTEA was enacted pursuant to Article I, Section 8, cl. 8 of the Constitution. Its constitutionally mandated goal is therefore to "suppl[y] the economic

[7] This Court, for example, subjected the must-carry rules to substantially more searching scrutiny than the court below applied to the CTEA, even though the *prima facie* (and, as it turns out, ultimate) economic justification for the must carry rules was substantially more sound than the economic rationale of the retroactive extension of copyright. See *Turner* II, 520 U.S. at 197-224. Another example is provided by a different panel of the Court of Appeals for the D.C. Circuit, which recently struck down the vertical and horizontal ownership rules imposed by the Federal Communications Commission on cable operators. Those rules—though held insufficiently justified—were based on a substantially more plausible economic rationale than any justification that could be offered in support of the CTEA. *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir.) *cert. denied sub nom. Consumer Fed'n of Am. v. FCC*, 122 S.Ct. 644 (2001) (FCC argued, for example, that a minimum of four national cable operators was necessary to give unaffiliated programmers sufficient access to cable outlets for their programming without market distortion, whereas the Court of Appeals held that the Commission had not established that a national duopoly would not have sufficed).

incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558. The Senate Report on the predecessor bill indeed suggested that authors "are able to bargain for the present value of the projected income from commercial exploitation of the work over the course of the entire copyright term. The additional value of a longer term will, therefore, be reflected in the money received by the author for the transfer of his or her copyright, leading again to increased incentives to create." S. Rep. No 104-315 at 12 (1996).

It is not at all clear, however, that the CTEA's *prospective* extension of the copyright terms, much less its retroactive extension, can be justified in terms of the creation of economic incentives. The discounted present value of any revenue stream to be captured eight decades or more in the future is virtually non-existent. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 323-29 (1970); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 17 J. L. STUD. 325, 361-62 (1988). We can calculate, for example, how much an author might presently expect to receive in return for one million dollars of royalties 85 years hence, or what the current value of these million dollars would be to investors invited to finance a movie. Using a conservative (relative to media investment risk) business discount rate of 10-12%, the present value of these expected one million dollars is only between $303 and $66, barely enough to cover the cost of a modest lunch for prospective investors. Imagine the responses a movie producer would get from the investors gathered at this lunch were he to promise them that they will indeed reap these riches eighty or ninety years hence.

If the CTEA's *prospective* extension of copyright terms is hard to justify in terms of the creation of economic incentives, the CTEA's *retrospective* application of this

extension creates no economic incentives at all. A retroactive extension of copyright term applies by definition to works that have already been created and copyrighted. Absolutely no incentive is necessary to ensure the creation of *these* works, because they have already been created. Incentives existing prior to the CTEA were evidently sufficient to bring them into being. *See* Landes & Posner, *supra*, at 362; Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1194-95 (1970). And yet, as the history of the CTEA makes clear, it is precisely retroactive application that introduces the greatest distortion of the political process, for it is the risk-free immediate windfall on aging inventories that was the greatest payoff for lobbying in support of the CTEA's term extension.

Perhaps cognizant of the woeful inadequacy of the incentives-based justification for the CTEA, legislative history suggests three additional justifications for the CTEA, discussed extensively in the Senate Report from 1995 and restated perfunctorily in the House Report from 1998. The three reasons are: First, harmonization with Europe; second, increasing life span and a supposed resultant need to adjust the term to assure a royalty stream during the lifetime of both the author and at least one additional generation; and third, the preservation of existing works.

This Court need not actually review these justifications at this time, but need only remand to the lower court to consider them. It is the role of the courts below to scrutinize these alternative justifications and to judge their sufficiency. It is clear, however, that the government will find it difficult, if not impossible, to

justify the CTEA in its entirety in the face of appropriately heightened scrutiny.

"Harmonization" with nations that protect speech less than does the United States is not a legitimate government interest. The Government could not impose prior restraints on hate speech, citing as its important interest the fact that it had signed a treaty obligation to do so. A mere policy preference for harmonizing with the longer protection periods available in Europe is accordingly an inadequate justification for extending copyright terms in ways that unduly damage public discourse. That Europe's nations have chosen a different balance between freedom of speech and social policy is not a legitimate reason for restricting American freedom of speech. Moreover, there is no evidence in the legislative record to support the rather surprising claim that American competitiveness depends on revenue streams from 75-year-old materials, or that the Government could not have persuaded the European Union to treat American companies no worse than it treats its own companies. Plainly, the industry lobbies responsible for term extension are much more interested in using the harmonization argument to tax American consumers for an additional twenty years than they are, for example, in receiving national treatment in Europe. Here again the CTEA bespeaks more of a Congress beholden to industry lobbying than of reasoned balance between the promotion of copyrighted expression and freedom of speech.

The argument about the need to adjust the law to account for longer life spans fares no better. It is simply a romanticized version of the incentive argument. Neither teen pop stars nor octogenarian composers are likely to be affected by the prospect of great grandchildren living on the revenue flow from their royalties eighty or a hundred and twenty years hence, any more than would the investors

gathered at the movie producer's lunch be likely to be impressed by revenue streams many decades removed. Indeed, lengthening life span already increases the average length of protection because the term of a copyright is pegged to the life of the author, thereby allowing owners to save more over the term of a copyright so as to support their offspring after the copyright expires.

The argument about *preserving* existing works, rather than providing incentives for the creation of new works, is no more convincing than the first two justifications proffered. There is no evidence that the preservation of existing works presents an actual problem. The ease with which we can access old books from Plato to Kant, Shakespeare to Dickens, suggests that there is little that needs to be done for books. Neither is there a dearth of recordings of Mozart's music. Perhaps there is some special problem for film or rare musical recordings. If so, Congress can address the problem by a variety of less restrictive means aimed to help actual restorers. These could range from tax benefits or targeted subsidies, to misappropriation-type rules that prevent slavish copying of restored works by competitors. Any of these options would be substantially less restrictive than an across-the-board retroactive extension of all copyrights, which would not only afford statutory protection to preserved versions of old works, but would also prohibit all new works that are in any way "derivative" from these old works. *Turner II*, 520 U.S. at 253-56 (O'Connor, J. dissenting) (describing competition regulation and subsidy as less restrictive alternatives to the "must carry" legislation in question there).

Perhaps there are other, good reasons to support the CTEA's retroactive extension. It is unnecessary, however, for this Court to prejudge the weight and sufficiency of

hypothetical reasons, because the court below never properly considered them. It is not this Court's practice "to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 760 (1996).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court reverse the judgment below and remand for reconsideration in light of an appropriate First Amendment standard of review.

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IN THE

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ERIC ELDRED, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AND THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Did the D.C. Circuit err in holding that Congress has the power under the Copyright Clause to extend retrospectively the term of existing copyrights?

2. Is a law that extends the term of existing and future copyrights "categorically immune from challenge[] under the First Amendment"?

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IN THE

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BRIEF OF *AMICI CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AND THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE* [1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981, which publishes educational materials both in print and on the internet. Eagle Forum ELDF's objective is to facilitate participation in the process of self-government so

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

that America will continue to be a land of limited government, respect for family integrity, public and private virtue, and free enterprise. In particular, Eagle Forum ELDF opposes expansion of federal power under the Copyright Clause, and defends First Amendment interests against encroachment by copyrights.

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit organization dedicated to defending the practice of private medicine. Founded in 1943, AAPS publishes a newsletter, journal and internet-based materials, in furtherance of its goals of limited government and the free market. The interests of AAPS include defending First Amendment rights against interference by copyright law, and opposing retroactive extension of intellectual property protection for any innovation, including prescription drugs.

SUMMARY OF ARGUMENT

Nothing beats a government-conferred monopoly, and a few special interests obtained one in the unprecedented single-day passage of the Sonny Bono Copyright Term Extension Act ("CTEA"). On October 7, 1998, the Senate Judiciary Committee approved the CTEA by unanimous consent. 144 Cong. Rec. S11672 (1998). That same day, the full Senate passed the bill by unanimous consent, without even a roll call. *Id.* S11673. Still during the same day, the House passed it by voice vote under suspension of the rules. 144 Cong. Rec. H9946 (1998). President Clinton subsequently signed it into law. Pub. L. No. 105-298, 112 Stat. 2827 (1998). Limited government, competition, future innovation and free speech were all pummeled in the stampede.

The CTEA extended the copyright on future *and existing* works by a remarkable twenty additional years. This additional period alone far exceeds the entire term of 14 years provided in the first copyright law. Act of May 31, 1790, § 1, 1 Stat. 124. The CTEA thereby thwarts competitive and free

speech uses of 75-year-old works for another twenty years. Moreover, this was the eleventh time in the past forty years that Congress has extended the copyright term. If such federal overreaching is upheld, then Congress could repeatedly extend copyright restrictions on existing works for periods totaling decades or even centuries.

That is plainly not what the Framers intended in granting Congress its copyright power. The Copyright Clause limits congressional authority to grants of "limited Times" that "promote the Progress of Science." U.S. Const. art. I, § 8, cl. 8. Government-granted monopolies are economically disfavored, as the Framers recognized. *See, e.g., Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966) ("Jefferson, like other Americans, had an instinctive aversion to monopolies. It was a monopoly on tea that sparked the Revolution and Jefferson certainly did not favor an equivalent form of monopoly under the new government."). The CTEA's expansion of a copyright monopoly for existing works is neither "limited" in times nor in promotion of "Progress". This represents a government-conferred monopoly beyond an enumerated power of Congress.

A retroactive extension of copyright term also runs afoul of the right to free speech. Anglo-American copyright law has a history of controlling and censoring speech hostile to the view of the Crown. Retroactive extension of copyright term is an unconstitutional censorship of speech utilizing long-existing works. The CTEA prolongs the ability of a few to block use by the public of works that lost their creative value long ago. Like other misuses of copyright, including attempts to own and sell access to legal regulations, the CTEA is inconsistent with the First Amendment and it was error for the court below to hold otherwise.

Amici also object to the lower court's reliance on foreign law as a justification for the CTEA. Under that approach, few constitutional limits on federal power would be meaning-

ful, as Congress could expand its power to harmonize with foreign countries in endless ways. But foreign governments are obviously not subject to the U.S. Constitution, and it makes little sense to cite their rules as justification for domestic legislation. Conceptually, there is never a need to dilute principles of limited American government in order to accommodate different standards elsewhere. Moreover, the alleged harmonization is a fiction, as the term extension actually increased the disparity with foreign law for many copyright holders.

ARGUMENT

The Copyright Clause guards against state-conferred monopolies, which are economically deleterious and disruptive of free speech. Its text expressly restrains congressional authority, in both purpose and effect. Supreme Court precedents reinforce these limits on copyright. The First Amendment further narrows federal power in this field, as the public enjoys free speech rights in works that can no longer be called original. The court below erred in rejecting these essential restraints on federal power.

I. THE COPYRIGHT CLAUSE EXPRESSLY LIMITS CONGRESSIONAL POWER CONCERNING GOVERNMENT-CONFERRED MONOPOLIES.

Congress does not have *carte blanche* to grant monopolies, as the British king granted monopolies to his favorite courtiers to accord them private enrichment. The Copyright Clause restricts congressional power:

> To promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.

U.S. Const., art. I, § 8, cl. 8. This clause expressly contains two essential restraints on Congress with respect to copyrights: their purpose must be to "promote the Progress," as in creating incentives for new works, and they must be "for limited Times," as in the 1790 copyright act. *See, e.g.*, *Goldstein v. California*, 412 U.S. 546, 555 (1973) ("The clause thus describes both the objective which Congress may seek and the means to address it.").

These restrictions on purpose and means are essential to ensure that Congress encourage creative and innovative works, rather than inhibit them through state-conferred monopolies over speech. The plain meaning of these limitations should be applied here. *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 116 n.13 (1996) (Souter, Ginsburg and Breyer, JJ., dissenting) (noting that "plain meaning is the Man of Steel"); Monaghan, *Our Perfect Constitution*, 56 N. Y. U. L. Rev. 353, 383-384 (1981) ("For the purposes of *legal* reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration"). *Cf. United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989) (holding that "there generally is no need for a court to inquire beyond the plain language of the statute").

A. The Plain Meaning of the Copyright Clause Limits Congressional Power to Grant Copyright Monopolies.

"The powers of the legislature are defined, *and limited*; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) (emphasis added). The enumerated federal powers, once defined, are thus also "limited" by their very terms. "The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise" of *Marbury* quoted above. *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997). "Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would

not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint." *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

For enumerated powers, the language of the enumeration provides the restraining parameters. "[L]imitations on the commerce power are inherent in the very language of the Commerce Clause." *United States v. Lopez*, 514 U.S. 549, 553 (1995) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824)). This tenet of limited government applies with even greater force to the Copyright Clause, where federal overreaching can harm discourse and communications vital to our society. As with the Commerce Clause, congressional overreaching pursuant to the Copyright Clause is untenable. "Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate" under the Commerce Clause. *Lopez*, 514 U.S. at 564. That observation applies *a fortiori* to the Copyright Clause.

Among all the Section 8 powers granted to Congress, only the Copyright Clause places express limits on the acceptable means. Such a pronounced limitation must be afforded particular weight, as this Court has held in an analogous context. "Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform through the United States. . . . Thus, if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982). *Cf. Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a

statutory provision so as to render superfluous other provisions in the same enactment.'") (quoting *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990)).

This Court has already so held in the copyright context: "the monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to promote a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Copyright law must "motivate the creative activity of authors and inventors by the provision of a special reward, and [] allow the public access to the products of their genius after the limited period of exclusive control has expired." *Id.* Chief Justice Hughes declared that "[t]he *sole* interest of the United States and the *primary object* in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (quoted in *Sony*, 464 U.S. at 429 and in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), emphasis added).

The limited authority of Congress under the Copyright Clause is to induce creators to produce and then release their work to the public. "*As the text of the Constitution makes plain*, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product." *Sony*, 464 U.S. at 429 (emphasis added). Congress lacks the power to enrich the owners of old works that have already been released. Federal law may induce publication by enacting new copyright entitlements, but may not repeatedly thwart public access for old works that have already been published and fulfilled their mission of "promot[ing] the progress of science and useful arts." The "reward to the author or artist" must

"serve[] to induce release to the public of the products of his creative genius." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

The retroactivity of CTEA violates both its utilitarian purpose (to promote progress) and its limitation on time. No creative progress is induced by prolonging the copyright of a work published long ago. "As employed, the terms 'to promote' are synonymous with the words 'to stimulate,' 'to encourage,' or 'to induce.'" *Goldstein*, 412 U.S. at 555. Extending the copyright on works dating back to 1923 obstructs, rather than promotes, creative use of the old works by others. It does nothing to advance an important public purpose, and merely promotes the "special private benefit" precluded by *Sony*. The CTEA is unconstitutional in granting a monopoly entitlement to old works. *Cf. City of Boerne*, 521 U.S. at 536 ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."). Where, as in *Morrison*, there is no plausible federal justification for the legislation, invalidation is necessary. *See Morrison*, 529 U.S. at 607 ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

The *post hoc* extension in the copyright duration of the old works likewise runs afoul of the "limited times" constitutional requirement. This extension is the legal equivalent of a referee suddenly adding time onto the game clock as the final buzzer sounds, which rightly caused a national furor in the 1972 Olympic basketball game between the United States and the Soviet Union. *See* 93 Cong. Rec. S15896 (1974) (statement of Sen. Pearson concerning the Olympic incident). If "limited" means anything at all, it precludes the repeated increases in time reflected by the CTEA. If upheld, Congress could repeatedly extend patent terms on prescription drugs invented long ago, thereby frustrating competition and affordable public access to the medication.

Congress lacks any copyright authority once an old work has been widely published. "[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works [and] it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). Once copyright serves its purpose by inducing public release of the work, Congress has satisfied its only permissible objective under the Copyright Clause. CTEA cannot legally enrich the copyright holders further. Former Senate Judiciary Committee Chairman Orrin Hatch is mistaken in his view that federal "copyright protection should be expanded unless the extent of such protection would hamper creativity or the wide dissemination of works." Senator Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. Pitt. L. Rev. 719, 735 (1998). Federal copyright entitlements require affirmative inducement to create, not merely lack of proof of new harm.

The Framers' limitation on congressional power to grant monopolies pursuant to the Copyright Clause helps limit their deleterious effect. *Cf. United States v. Von's Grocery Co.*, 384 U.S. 270, 274 (1966) ("From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few."). Under monopolies, "all the other subjects of the state are taxed very absurdly in two different ways; first, by the high price of goods, which, in the case of a free trade, they could buy much cheaper; and secondly, by their total exclusion from a branch of business, which it might be both convenient and profitable for many of them to carry on." Adam Smith, *Wealth of Nations*, 814 (Random House: 1994, Cannon ed.).

Monopoly power over speech is particularly noxious, and disfavored by the Constitution. The Anglo-American origins of copyright monopolies are traceable to a desire to censor

rather than inspire. "Modern Anglo-American copyright law is traceable to the English Crown's desire in the early sixteenth century to censor the content of literary works." Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of the Digital Revolution for Artists*, 114 Harv. L. Rev. 2438, 2441 (2001). The scholarly refrain for legal restraints on congressional overreaching in this area has now risen to a fever pitch, and rightly so. In the context of music, one commentator aptly concluded that "using the courts and United States Copyright laws to maintain the recording industry status quo while protecting the coffers of big business, will perpetuate a mode of conducting business, and ultimately a society, that is contrary to the fundamental spirit of capitalism." Hunt, *Comment: In a Digital Age, the Musical Revolution Will be Digitalized*, 11 Alb. L.J. Sci. & Tech. 181, 201-2 (2000).

B. *Feist* and Its Precedents Prevent Congress From Retroactively Extending Copyrights in Old Works.

This Court has established that "[o]riginality is a constitutional requirement." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991). It is far more than a statutory restraint; it is a constitutional limitation of the enumerated power itself. Based on the language of the Copyright Clause, "the Court made it unmistakably clear that its terms presuppose a degree of originality." *Id.* (citing *The Trade-Mark Cases*, 100 U.S. 82 (1879) and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)). Congress simply lacks power under the Copyright Clause to extend copyright to works lacking in originality. "The originality requirement articulated in *The Trade-Mark Cases* and *Burrow-Giles* remains the touchstone of copyright protection today. It is the very premise of copyright law." *Feist*, 499 U.S. at 347 (quotations and citations omitted).

But "originality" for a reproducible work fades over time, particularly after the author has departed. Congressional fiat cannot, simply by saying so, bestow the constitutional requisite of originality on old, often-used works. *See Lopez*, 514 U.S. at 557 ("'Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'") (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)). *Cf. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (applying Eleventh Amendment to limit Congressional power under the Commerce Clause).

Works created in 1923, for which the copyright term was about to expire in the absence of the CTEA, can hardly be deemed "original" in 2002. Legally and artistically, their originality is exhausted, and Congress cannot breathe it back into them. There is no plausible basis for finding that these works retain sufficient originality to satisfy the constitutional requirement.

The court below acknowledged that "'[t]he *sine qua non* of copyright is originality.'" *Eldred v. Reno*, 239 F.3d 372, 376 (D.C. Cir. 2001), *cert. granted sub nom. Eldred v. Ashcroft*, 122 S. Ct. 1062 (2002) (quoting *Feist*, 499 U.S. at 345). But works created long ago by deceased authors, which are on the verge of losing their copyright protection, lack sufficient originality. This Court held that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (construing narrowly the holding in *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843)). Likewise, Congress lacks power to enact copyright term extension for works created long ago, facing expiration of their term.

The decision below erred in finding adequate originality for old works. It cited the Copyright Act of 1790, which extended protection to existing works. 239 F.3d at 377. Act of May 31, 1790 § 1, 1 Stat. 124. But that law merely federalized copyright law for the new government, and does not support the windfall for 75-year-old works under the CTEA. The court below relied on its crabbed view of *Feist* and the "originality" requirement, declaring that "[a]ll they tell us is that facts, like ideas, are outside the ambit of copyright." *Id.* Quite the contrary, the limitation on government power embodied in the Copyright Clause protects public access to works beyond the narrow category of facts and ideas.

The brilliance of *Feist* and its precedents lies not merely in the fact/expression dichotomy, but in its recognition that the Constitution sharply limits federal copyright power. "The primary objective of copyright is *not* to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'" *Feist*, 499 U.S. at 349 (quoting U.S. Const. art. I, § 8, cl. 8, and citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), emphasis added). The Copyright Clause is thus *not* there for Congress to reward the owners of creative works of the past. It is there to promote progress, particularly by the unknown creators of the future. Their efforts are hindered, not helped, by locking up old works and barring their free and convenient use.

The fact/expression distinction is by no means the only limitation on federal power concerning copyrights. Many works are beyond the scope of the Copyright Clause regardless of whether they are perceived to constitute "facts" under *Feist*. Judicial decisions are surely expressive, yet they may not be copyrighted. *Banks v. Manchester*, 128 U.S. 244 (1888). "The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it

is a declaration of unwritten law, or an interpretation of a constitution or a statute." *Id.* at 253 (citation omitted). While that decision cited the copyright statute, it made clear that its limitation was constitutional. "[T]his court . . . was unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." *Id.* at 254 (quotation omitted). There are many works that are or should also be beyond federal copyright reach, including statutes, regulations and government-mandated questionnaires, as well as old works with expiring copyright terms.

C. The Court Below Erred in Relying on Preservation as a Justification for Copyright Extension.

The court below strained mightily to find any possible public benefit from retroactive copyright extension. The most it could cite, however, was an alleged incentive for preserving 75-year-old motion pictures. "The Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration." *Eldred*, 239 F.3d at 379 (citing S. Rep. No. 104-315, at 12 (1996)). This purported basis cannot withstand scrutiny, and if sustained would eliminate all meaningful limits on federal copyright power.

Preserving old works utterly fails to satisfy the constitutional requirements of "originality" or promotion of progress. Preservation is no more original than the compilation found unworthy of copyright protection in *Feist*. 499 U.S. at 364 (holding that "copyright rewards originality, not effort"). Preservation fails to promote progress within the meaning of the Copyright Clause, regardless of its value as "sweat of the brow." *Id.* at 354 ("Without a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles.").

Many activities create economic value, but that does not qualify them for copyright protection. Functions played by printers, copiers, distributors, book stores, libraries, museums, internet websites, radio stations, etc., are productive and worthy of compensation. But, as the lower court itself acknowledged, originality is the *sine qua non* of copyright. *Eldred*, 239 F.3d at 376 (quoted above). Preservation of old works does not qualify.

Nor does the court below explain what net public benefit would result from extending copyright protection to 75-year-old movies. The Register of Copyrights testified that there is no evidence of any economic value, whether in preservation or otherwise, to retroactive extension in copyright. *See* written testimony of Marybeth Peters, Register of Copyrights, before the Senate Judiciary Committee on S. 483, Sept. 20, 1995, *available in* 1995 WL 557187 (F.D.C.H.) at 71 ("[T]here are no meaningful statistics to assist in determining the cost of extending the term and the benefits to be gained. Thus, on a pure economics analysis at this point it would be difficult to support.").

Furthermore, the preservation argument would justify perpetual extensions of duration by Congress. Every twenty years, Congress could cite this reason for extending copyrights on old works for another twenty years. Surely, at some point, prior to passage of yet another 100 years, this Court would invalidate the frustration of constitutional purpose entailed in perpetual extensions. The only issue would be how many extensions would be allowed. The CTEA represents the eleventh time in the past forty years that Congress has extended the copyright term, which is far beyond any reasonable or "limited times." *See Petitioners' Petition for a Writ of Certiorari, Eldred v. Ashcroft*, No. 01-618, Statement of the Case ¶ 2 & n.1 (Oct. 11, 2001) (citing the statutes). If Congress wants to grant an entitlement for those who preserve old movies, it must do so outside of the Copyright Clause.

Internet technology, moreover, has made the preservation argument factually untenable. Internet websites are actively preserving old works—made possible by *expiration* of their copyrights. *See, e.g.*, http://www.promo.net/pg/ (the Gutenberg Project, striving to preserve 10,000 old books online). The director of the Gutenberg Project, Michael S. Hart, estimated that the CTEA would "essentially prevent about one million books from entering the public domain over the next 20 years." Kaplan, *Free Book Sites Hurt by Copyright Law*, N.Y. Times on the Web, Oct. 30, 1998(http://www.nytimes.com/library/tech/98/10/cyber/cyberlaw/30law.html). There are numerous other public-domain preservation projects, many of which are far more prolific than copyright-inspired efforts. *See* Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 Berkeley Tech. L.J. 777, 855 & n.399 (2000).

Copyrights retard and obstruct public access to old works, because the revenue is too small relative to the transaction costs of tracking down, negotiating and paying heirs who may claim an interest in the copyright. A vast number of copyrighted works—including thousands of songs, for example—are out of print and unavailable in any form at any price. Current law does not require a copyright owner, as a condition of keeping his copyright, to ensure that the work remains available. Expiration of copyrights enables such material to be posted on the internet, thereby reaching a new audience and a new generation.

From an economic perspective, the alleged benefit of government-conferred copyright monopolies may be vastly overrated, and possibly harmful. *See, e.g.*, Fox, *The Economics of Expression and the Future of Copyright Law*, 25 Ohio N.U.L. Rev. 5, 15 (1999) ("[T]he level of information guaranteed by copyright law is merely the product of enforced scarcity, which might be good for the producers, but would surely not be good for the consumers who either pay

higher prices for their enjoyment of new expression or forgo it entirely."); *see also John Deere*, 383 U.S. at 7 (Jefferson "argued forcefully that 'the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.'") (quoting V Writings of Thomas Jefferson, at 47 (Ford ed., 1895)). Extending an entitlement to old works to the copyright holders perpetuates elevated transaction costs, frustrating free and efficient public access to the works, such as over the internet. Inefficiency and lost creativity by future artists are the result. *See generally*, Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960). In addition, the substantial costs of prolonged state-conferred monopolies, criticized by Adam Smith in *Wealth of Nations*, are even worse in our electronic age.

Trademark law provides ample continuing protection to legitimate reliance on commercial value in old works. *See, e.g., Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995) (holding that patents must expire, but "trademarks may be renewed in perpetuity") (citing *Kellogg Co. v National Biscuit Co.*, 305 U.S. 111, 119-20 (1938) (Brandeis, J.)). If, for example, the Walt Disney Company saw its copyright in Mickey Mouse expire, it could still maintain the exclusive right to use the image of Mickey Mouse as a trademark to identify all its products, from movies to theme parks to Peter Jennings and Ted Koppel.

II. FEDERAL LAW THAT EXTENDS THE TERM OF EXISTING AND FUTURE COPYRIGHTS IS NOT "CATEGORICALLY IMMUNE FROM CHALLENGE[] UNDER THE FIRST AMENDMENT."

The court below erred in holding that "copyrights are *categorically immune* from challenges under the First Amendment." *Eldred*, 239 F.3d at 375 (emphasis added). There is no justification or precedent for this categorical

denial of the Free Speech Clause to non-obscene, peaceful communications. Relevant authority is markedly in favor of the First Amendment.

This Court has applied principles of free speech to invalidate regulation of campaign expenditures, restrictions on commercial speech and excesses of libel law. Copyright law cannot and should not escape the same fate. *See, e.g., See Buckley v. Valeo*, 424 U.S. 1 (1976) (applying First Amendment to campaign regulation); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (applying First Amendment to commercial speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 342 (1974) (applying First Amendment to libel law); *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964) (same).

A. The First Amendment Limits New Expansions in Copyright Law.

A cited reason for supporting the First Amendment was to limit possible excesses under the Copyright Clause. "'Though it is not declared that Congress have a power to destroy the liberty of the press; yet in effect, they will have it . . . . They have a power to secure to authors the right of their writings. Under this, they may license the press, no doubt; and under licensing the press, they may suppress it.'" Ratification of the Constitution by the States, Pennsylvania, 2 The Documentary History of the Ratification of the Constitution 454 (1976) (quoting Pennsylvania Constitutional Convention Delegate Robert Whitehill on December 1, 1787). There is no exception to the First Amendment in favor of beneficiaries of federally conferred copyrights.

Politics often leads culture, and politically charged works dominate our heritage. Julia Ward Howe woke up one night with her inspiration to write the Battle Hymn of the Republic, and it has been sung in town meetings and churches ever since. Thomas Nast created his cartoon of Uncle Sam and it

quickly became part of the public consciousness. Monopolies to control the publication and distribution of these and other parts of our political and social culture are only permissible if carefully limited in duration.

Copyright law is increasingly used to suppress and censor speech. For example, an author who published interviews sympathetic to legal abortion invoked copyright to sue a priest over his quotations of them. *See Maxtone-Graham v. Burchaell*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987). A manufacturer attempted to suppress thousands of pages of potentially embarrassing litigation documents by citing copyright law. *See Grundberg v. Upjohn Co.*, 137 F.R.D. 372 (D. Utah 1991). *See also United Christian Scientists v. Christian Science Bd. of Dirs.*, 829 F.2d 1152, 1156 n.18 (D.C. Cir. 1987) (Christian Scientists' use of copyright to block an unorthodox version of Mary Baker Eddy's writings); *Religious Tech. Ctr. v. Netcom Online Commun. Servs.*, No. C-95-20091, 1997 U.S. Dist. LEXIS 23572, *6-*24 (N.D. Cal. Jan. 3, 1997) (Scientology-affiliated organizations' use of copyright against a critic). Though the statutory "fair use" doctrine is helpful in such cases, the First Amendment is the ultimate—and essential—defense to misuses of copyright to silence opponents.

"Fair use" and other statutory exceptions are inadequate to guarantee free speech rights for all misuses of copyright. This Court has held, for example, that Congress may not confer copyright on original judicial opinions. *Banks v. Manchester*, discussed *supra*. Under the same reasoning, the State should likewise be precluded from granting copyrights in other legal requirements, such as original statutes or regulations. Surely there is a constitutional right to freely restate, debate, and listen to legal requirements without fear of copyright violation. *See Buckley v. Valeo*, 424 U.S. at 14 ("a major purpose of th[e First] Amendment was to protect the free discussion of governmental affairs") (quotations

omitted); *Lamont v. Postmaster Gen'l*, 381 U.S. 301 (1965) (upholding a First Amendment right to receive information); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (noting the preparation of "the people for an intelligent exercise of their rights as citizens").

Justice Douglas emphasized, in the context of inhibiting ideas, how the First Amendment sharply limits the scope of copyright law: "Serious First Amendment questions would be raised if Congress' power over copyrights were construed to include the power to grant monopolies over certain ideas . . . . The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained. We should not construe the copyright laws to conflict so patently with the values that the First Amendment was designed to protect." *Lee v. Runge*, 404 U.S. 887, 892-93 (1971) (Douglas, J., dissenting from denial of certiorari) (citation omitted).

The view of the court below that copyrights are "categorically immune" from the First Amendment distorts the law concerning speech about legal requirements. 239 F.3d at 375. In *Practice Mgmt. Info. Corp. v. AMA*, 121 F.3d 516 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998), the court upheld a copyright for a legal requirement but then invalidated it on the grounds of misuse. In *Building Officials & Code Admin. v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980), the court held that it "cannot see how . . . copyright protection can be squared with the right of the public to know the law to which it is subject." *Id.* at 735. More recently, in *Veeck v. Southern Bldg. Code Congress Int'l, Inc.*, 241 F.3d 398 (5th Cir.), *reh'g en banc granted*, 268 F.3d 298 (5th Cir. 2001), a divided court could not find a traditional exception to copyright for privately developed legal requirements. The dissent shoehorned the subject matter into the "idea" portion of the idea/expression dichotomy, and denied copyright

enforcement on that basis. *Id.* at 415-17 (Little, J., dissenting). In each of these cases, the fiction that copyrights are categorically immune from the First Amendment causes enormous distortions. Applying the Free Speech Clause directly to invalidate copyrights for legal requirements is more straightforward, and essential to enable unfettered debate of public policy. Otherwise, *Amicus* AAPS would be unable to post and critique medical billing requirements due to the chilling effect of copyright claims in those requirements by the American Medical Association. *See Practice Mgmt. Info. Corp. v. AMA*, 121 F.3d at 520 & n.8.

More recently, the Eleventh Circuit discussed essential First Amendment limitations on copyright in the context of the book "Gone With the Wind." *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (discussing First Amendment protections woven into copyright law in holding copyright may not be used to censor or shield a work from public comment). The *Houghton Mifflin* court refrained from allowing the use of copyright to chill free speech. "'Freedom of speech . . . requires the preservation of a meaningful public or democratic dialogue, as well as the uses of speech as a safety valve against violent acts, and as an end in itself.'" *Id.* at 1263 (quoting 1 Nimmer on Copyright § 1.10[B][1] (2001)). The current statutory doctrine of fair use, passed in 1976, accommodated only the First Amendment concerns that had been judicially created as of that time. 268 F.3d at 1264 ("Until codification of the fair-use doctrine in the 1976 Act, fair use was a judge-made right developed to preserve the constitutionality of copyright legislation by protecting First Amendment values."). That fair use exception is helpless against congressional overreaching like the CTEA, and the First Amendment must remain fully applicable.

Expansive application of copyright law has become an impediment to scrutinizing and improving the materials mandated for children in school. In *C.N. v. Ridgewood Board*

of Education, 146 F. Supp. 2d 528 (D.N.J.), *aff'd in part and rev'd in part*, 281 F.3d 219 (3d Cir. 2001), a public school administered a questionnaire that was offensive to parents without ever distributing it to them. Litigation ensued through the appellate level, but the copyrighted questionnaire remains unpublished so that the general public remains unaware of its contents. Neither the questionnaire nor many other state-mandated materials are available for scrutiny on the internet, often due to copyright claims. *Amicus* Eagle Forum ELDF is unable to post state-mandated, non-academic questionnaires on its website due to interference by copyright with free speech, thereby sharply reducing public access to and scrutiny of government-related activities and documents.

The CTEA is one of many unwarranted attempts to expand the scope of copyright law, chilling speech in the process. The First Amendment necessarily restrains this overreaching, and categorical immunity for copyright must be rejected.

B. The First Amendment Must Limit Copyright Restraints on Certain Categories of Expression, Including Old Works.

"It is not what you say, but how you say it" is a familiar aphorism. When dealing with matters of public concern, those expressions are squarely within the ambit of the First Amendment. Judicial opinions, for example, are highly expressive and yet surely within the full right of the public to recite, publish, and even resell. Testimony before Congress, whether concerning new legislation or an investigation, is also expressive and yet subject to free recitation. Statutes, regulations, and other legal requirements must trigger application of the First Amendment to any restrictions on republication. Their expression is fundamental to their meaning.

Repeating or publishing what transpires in a courtroom must also be subject to First Amendment protections. Dramatic courtroom testimony in a colorful case can be highly expressive, and yet the public must have full rights to

it. Could the heirs of William Jennings Bryan claim title to his testimony during the famous Scopes trial in 1925? The First Amendment must allow republication by anyone.

The court below relied on the oft-cited idea/expression dichotomy to hold that the First Amendment does not apply to expressions, and only protects ideas and facts. But the First Amendment cannot be so narrow in scope. In many circumstances there must be a right to publish expressions regardless of whether the speaker consents. When those expressions implicate issues of public interest, for example, such right is paramount. *See Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (holding in favor of a broadcaster of an illegally taped conversation because "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern"). It would have been impossible to separate the provocative expression from the underlying substance on that phone call. *See id.* at 518-19 (describing the highly expressive, tape-recorded comments).

Only in *Harper & Row, Pub., Inc. v. Nation Enter.*, 471 U.S. 539 (1985), has this Court applied the idea/expression dichotomy to reject a First Amendment claim to copyrighted material. There, a filched portion of former President Ford's memoirs found its way to The Nation magazine, which published without approval 300-400 words verbatim as part of a 2,250-word article. This Court held, 6-3, that The Nation lacked a First Amendment right to publish verbatim the snippets from the memoirs, implying that it could only publish the underlying ideas. *Id.* at 556-57.

The *Harper & Row* decision should be narrowed to its unique facts, which included The Nation having scheduled publication to scoop a more complete release in Time magazine. *Id.* at 541. Its narrow holding is that the First Amendment cannot "effectively destroy any expectation of copyright protection in the work of a public figure." *Id.*

at 557. The broader principle should survive: there can be a First Amendment right in expressions. Expression is often more important than content, and to translate to another expression can change its meaning. For example, The Nation published the following from former President Ford's memoirs: Ford said he pardoned President Nixon in order "to get the monkey off my back one way or the other." *Id.* at 573 & n.10. The Nation also published Ford's regret for his "cowardice" in not defending Vice President Rockefeller against conservative criticism. *Id.* at 570 & n.1. There is no way to precisely paraphrase those and other expressions in Ford's memoirs, and the First Amendment safeguards their recitation.

Similarly, the First Amendment protects many uses of old works that have been part of our social fabric for 75 years or longer. In the absence of legitimate trademark protection, the Free Speech Clause protects republication of Santa Claus, Uncle Sam, Mickey Mouse and Bugs Bunny, after a reasonably limited time, as surely as it protects other social discourse. Under the CTEA, the familiar depiction of Santa Claus would not have entered the public domain until 1973. Zeitlin, *Strangling Culture with a Copyright Law*, N.Y. Times, Apr. 25, 1998, at A15 ("Dennis Karjala, law professor at the University of Arizona, has noted that under the new law our roly-poly Santa Claus, originally created by the 19th-century cartoonist Thomas Nast, would not have gone into the public domain until 1973. Even the United States Government would have had to pay royalties to use Nast's Uncle Sam in all of this century's wars."). There is no categorical immunity for old works from the First Amendment.

C. The First Amendment Right of Public Access Precludes Retroactive Extension of Copyright Term.

The First Amendment also protects the right to receive and access old copyrighted material, in addition to the right to

republish it. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (guaranteeing right to information on public events, including trials); *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 92 (1977) (establishing right to receive commercial speech); *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) ("'It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.'") (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-90 (1969)).

Copyright extensions, particularly retroactive ones, cannot be immune from these general principles guaranteeing First Amendment rights of access. The costly availability of the old work from the copyright holder is not an adequate substitute. This Court has emphasized that:

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.

Virginia State Bd. of Pharmacy, 425 U.S. at 757 n.15. *See also Lamont v. Postmaster Gen'l*, 381 U.S. 301 (1965) (upholding a First Amendment right to receive information); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] . . . necessarily protects the right to receive. . . .").

The perpetual extension in copyrights for works, released to the public long ago, directly implicates the First Amendment right of access to those works.

III. THE ALLEGED HARMONIZATION WITH FOREIGN LAW IS NEITHER A LEGITIMATE CONSTITUTIONAL BASIS NOR A FACTUAL ONE.

Limitations on enumerated powers are not subject to the views of foreign nations. The lower court erred in relying on harmonization with foreign law as a justification for the CTEA. Under that approach, few constitutional limits on state power would be meaningful, as Congress could expand federal legislation to harmonize with foreign countries in endless ways. As Judge Sentelle declared below, "[n]either the European Union nor its constituent nation states are bound by the Constitution of the United States. That Union may have all sorts of laws about copyrights or any other subject which are beyond the power of our constitutionally defined central government." 239 F.3d at 384 (Sentelle, J., dissenting). Legal globalization cannot dilute constitutional restraints.

Nor is harmonization an accurate description of the CTEA. The court below explained its legal globalization as follows:

> The Act matches United States copyrights to the terms of copyrights granted by the European Union, see Council Directive 93/98, art. 7, 1993 O.J. (L 290) 9; in an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits for the exploitation of copyrights. This is a powerful indication that the CTEA is a 'necessary and proper' measure to meet contemporary circumstances rather than a step on the way to making copyrights perpetual; the force of that evidence is hardly diminished because, as the dissent correctly points out, the EU is not bound by the Copyright Clause of our Constitution.

239 F.3d at 379. In addition to being infirm as a constitutional argument, harmonization also fails factually.

For anonymous and pseudonymous works, the CTEA actually increased the disparity in terms between the United States and the European Union, thereby demonstrating that harmony is not the justification. *Compare* CTEA § 102(b), 17 U.S.C. § 302(c) (increasing by twenty years the terms, from 75 to 95 years from first publication and from 100 to 120 years from creation, whichever is shorter) *with* Council Directive 93/98, 1993 O.J. (L 290) art. 1, para. 3 (70 years from publication). The CTEA increases the disparity for works for hire also. *Compare* CTEA § 102(b), 17 U.S.C. § 302(c) (increasing by twenty years the terms, from 75 to 95 years from first publication and from 100 to 120 years from creation, whichever is shorter) *with* Council Directive 93/98, 1993 O.J. (L 290) art. 1, para. 4 (most European countries do not protect works for hire; those that do use a term of 70 years from publication). In addition to these disparities, there are many fundamental differences between American and European copyright law, such as a denial of "fair use" doctrine in Europe. *See* Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 Wash. & Lee L. Rev. 33, 51 (1997) (European "moral rights are utterly incompatible with fair use."). One commentator has concluded that "[i]n reality, [the CTEA] term extension does little to truly 'harmonize' United States and European copyright law, and this rationale, therefore, does not support term extension." Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 Univ. Memphis L. Rev. 363, 394 (2000).

As Professor William Patry, former Counsel to the Subcommittee on Intellectual Property & Judicial Administration for the House of Representatives, observed:

> [T]he United States existed with an unharmonized term of protection from 1888 until 1978 without any untoward effects. If harmonization is so important, it is baffling that United States negotiators did not seek (or seek to acquiesce in) a basic international standard of life plus seventy in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). If life plus seventy had been set as the GATT standard, United States trade negotiators could have come to Congress and argued that term extension had to be put in the fast-track GATT-implementing legislation. But no such effort was made or even contemplated because the harmonization argument is entirely *post hoc*.

Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 Notre Dame L. Rev. 907, 930 (1997).

The U.S. Constitution is fundamentally different from the rules of the European Union and virtually every other country. The Copyright Clause takes a more limited view of intellectual property than other jurisdictions, thereby allowing creativity and competition to flourish. Europe, for example, generally does not allow the "fair use" that is constitutionally required in the United States. *See* Gifford, *supra*, 30 Univ. Memphis L. Rev. at 394. Congress lacks power to make American copyright law more similar to a foreign model that the Constitution never embraced.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

ERIC ELDRED, et al.,

Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE EDWARD SAMUELS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The question presented in this case is whether Congress had constitutional power to enact the Copyright Term Extenstion Act of 1998 (the "CTEA").

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INTERESTS OF AMICUS CURIAE[1]

This brief amicus curiae in support of the respondent is submitted pursuant to Rule 37 of the Rules of this Court.

I have been a professor at New York Law School for twenty-five years, teaching copyright, commercial law, and legal method. As an educator, and as an author and a user of copyrighted and public domain works, I am concerned for the continued incentives for creativity that are embodied in the copyright statute. I was not a supporter of the Copyright Term Extension Act of 1998, and have no particular opinion about whether it was wise or unwise to extend the term of copyrights by twenty years, as Congress did in that amendment. However, I am concerned that Congress not be unduly restricted in its ability to weigh the many complex issues and interests as it continues to adapt copyright to emerging markets and new technologies in an international environment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief reviews the historical context of the case. While it will consider the limited times provision and the application of the First Amendment, it will focus upon the history and meaning of the constitutional phrase "to

[1] Counsel for petitioners and respondent have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court. No counsel for a party, or anyone else except for amicus, has authored this brief in whole or in part, or made any monetary contribution in any form.

promote the Progress of Science and useful Arts." A review of that history will show that Congress, in extending the term of copyright by twenty years, acted pursuant to the power granted to it under the Constitution.

The 212-year history of copyright in the United States is a history of constant expansion of rights. The first copyright act of 1790 protected only maps, charts and books, but subsequent acts have added dozens of new creative works: prints in 1802, music in 1831, photographs in 1865, dramatic works in 1870, paintings, drawings and sculpture in 1870, movies in 1912, sound recordings in 1971, dance in 1976, computer programs in 1980, architectural works in 1990, and boat hull designs in 1998. During the same period, Congress has expanded the scope of rights to include not only the rights to copy and distribute works, but also the exclusive rights to perform certain works publicly in 1856, to create certain derivative works in 1870, to display certain works publicly in 1976, to preserve the integrity of and to claim authorship of certain visual works in 1990, to create and distribute recordings of live musical works in 1994, and to protect works by technological protection measures and the encoding of copyright management information in 1998. Congress has also expanded copyright by extending the term of copyrights in 1831, 1909, 1976, and 1998;[2] and by eliminating the

[2] Petitioners state throughout their brief that Congress has extended the term of copyright "eleven times in the past forty years." These statements are misleading, if not downright disingenuous. In the past 90 years (since the 1909 act established a maximum duration of 56 years), the term has been basically extended only twice, to life plus 50 years in 1976, and to life plus 70 years in 1998. The other nine extensions were interim extensions for roughly one- or two-year periods,

(Continued on following page)

formalities of notice, registration, deposit and renewal, primarily in 1988.

As Congress has expanded the rights of copyright owners, it has wisely balanced the expansion with dozens of limitations on those rights. Copyright does not cover works of utility, facts, or ideas. It does not prevent the distribution of works beyond the "first sale" authorized by the copyright owner. Copyright is subject to dozens of exceptions and compulsory licenses, particularly in the context of new technologies. And it is subject to the fair use doctrine, which authorizes users to make use of copyrighted works in limited contexts.

One of the great themes of U.S. copyright in the twentieth century was the extent to which we finally brought our own laws into conformity with international standards. Since 1886, the Berne Union defined the copyright standard for much of the rest of the world; it was

enacted between 1962 and 1974, so that copyrighted works would not go into the public domain pending adoption of the new 75-year term for existing copyrights. Pub. L. 87-668, 76 Stat. 555 (1962); Pub. L. 89-142, 79 Stat. 581 (1965); Pub. L. 90-141, 81 Stat. 464 (1967); Pub. L. 90-416, 82 Stat. 397 (1968); Pub. L. 91-147, 83 Stat. 360 (1969); Pub. L. 91-555, 84 Stat. 1441 (1970); Pub. L. 92-170, 85 Stat. 490 (1971); Pub. L. 92-566, 86 Stat. 1181 (1972); Pub. L. 93-573, 88 Stat. 1873 (1974). In no case did the extension exceed the 75-year term that was ultimately adopted by Congress in the 1976 Act.

Congress has hardly been headstrong in extending the term of copyright. In 1909 and throughout the twentieth century, many advocates of copyright proposed rejection of the "outmoded" structure of the Statute of Anne, and adoption of the life plus 50 year system that prevailed in most of the rest of the world. Had Congress adopted the more modern term in 1909, instead of 1976, there would have been only two term extensions in the last 170 years (since the extension to a maximum of 42 years in 1831), instead of the last 90 years.

not until 1988 that the United States was able to bring its laws within the requirements of that treaty, and join the international copyright community.

Petitioners focus upon only one aspect of this rich history. They argue that the constitutional grant of power to Congress to pass copyright laws "to promote the Progress of Science and useful Arts" requires that Congress act only for the purpose of increasing the public domain. A historical review will show that increase of the public domain was but one of many factors embodied in the constitutional phrase. To seize upon or overemphasize just one aspect of the phrase is to thwart its meaning, and bind Congress in ways inconsistent with the full meaning of the constitutional mandate.

ARGUMENT

I. The petitioners' novel theory equates the constitutional phrase "the Progress of Science and useful Arts" with an increase in the public domain.

Petitioners argue that the CTEA violates the "limited Times" provision of the copyright clause.[3] Perhaps recognizing that the life of the author plus 70 years, or 95

[3] Actually, although several amici take a different position, petitioners concede, at p. 14: "Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court." Petitioners' entire constitutional attack is directed at the application of the CTEA to existing works; their only argument against the application of the CTEA to works created after its effective date is that the different applications of the statute are inseverable. *Id.* at 48.

years, is obviously a "limited Time," the petitioners seek to link the limited times provision to an absolutely novel interpretation of the copyright clause. Petitioners essentially argue that the phrase "to promote the Progress of Science and useful Arts" is synonymous with an increase in the public domain. They argue that Congress may not decrease the public domain (an issue that is not before this Court, since the CTEA did not remove a single work from the public domain). Extending their novel theory, they argue that once Congress, pursuant to its constitutional power, has set a term of copyright, it is prohibited from extending that term, even if the term has not yet expired.

One of the many problems with this theory is that it simply proves too much. By this reasoning, every single extension of copyright from the 1790 act through the 1998 act, as well as many other acts adjusting the existing rights in copyrighted works, would be unconstitutional.

This Court has had occasion to hold that the originality requirement in copyright law is constitutional in scope. *See Trade-Mark Cases,* 100 U.S. 82 (1879); *Feist Publications, Inc. v. Rural Telephone Service Co, Inc.,* 499 U.S. 340 (1991). Seeking to bring this case within the reasoning of those cases, petitioners argue that the originality requirement is to be found in their novel interpretation of the "Progress of Science and useful Arts" clause. However, those cases were based upon the interpretation of the words "authors" and "writings," importing an originality requirement into the copyright power. There is no question in this case that the CTEA has been applied to any works except the original "writings" of "authors," fully within the scope of Congressional power. By petitioners' reasoning, original works of authorship would miraculously cease to be original once they have been created.

II. The constitutional phrase "the Progress of Science and useful Arts" is not directed primarily at the ultimate increase in the public domain.

A. In the state statutes passed under the Articles of Confederation, the "progress" of science and arts was to be achieved primarily by encouraging the creation and publication of new works.

There is little direct record of what the drafters of the Constitution intended when they adopted the phrase "to promote the Progress of Science and useful Arts." But much insight can be gleaned from the practice of the states under the Articles of Confederation, since it can be assumed that the drafters of the Constitution and of the first copyright act were familiar with the pre-existing state laws.

The preamble to the Massachusetts statute of 1783, which served as the model for New Hampshire and Rhode Island, read:

> Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind;

> Therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind . . . .

Library of Congress, *Copyright Office Bulletin No. 3, Copyright Enactments of the United States 1783-1906* (1906), at 14. The preamble to Connecticut's 1783 copyright statute, which served as a model for the Georgia and New York statutes, stated that:

> Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind. . . .

Id. at 11.

From these preambles, it is clear that the inducement contemplated in the statutes is to "encourage learned and ingenious persons to write" (as stated in the Massachusetts statute) and to "encourage men of learning and genius to publish" (as stated in the Connecticut statute) their works. Although works were obviously intended to go into the public domain at the expiration of the copyrights, the "public good" wasn't something that would be achieved only at that later date; the "public good" was achieved at the outset by the creation and publication of the works.

B. The constitutional phrase "the Progress of Science and useful Arts" was directed at the creation and publication of works.

The Constitution grants Congress the power to pass copyright law as follows:

> Article I, §8. The Congress shall have Power: . . .
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

In *The Federalist No. 43* (Gideon ed., George Carey and James McClellan, ed., 2001), at 222, James Madison gave pretty much the only contemporary public explanation of the phrase when he said:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain, to be a right of common law. . . . The public good fully coincides . . . with the claims of individuals. The States cannot separately make effectual provision [for copyright], and most of them have anticipated the decision of this point, by laws passed at the instance of congress.

By the "public good," Madison could not have meant simply "the public domain," since the "public good" will not "fully coincide . . . with the claims of individuals" after the term of copyright has expired. What he meant was that the progress of science and arts depends entirely upon the creation and distribution of such works. Madison's focus

was, as the Constitution's focus was, as the earlier state statutes' focus was, on the creation and distribution of works.[4] Of course, it was assumed that works would ultimately go into the public domain, but that was as a result of the "limited Times" provision, not something necessarily envisioned within the "Progress of Science and useful Arts" clause.

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[4] Petitioners recognize at p. 23 of their brief the "quid pro quo requirement of the copyright clause." Under copyright law from 1790 through 1977, publication was generally the prerequisite for federal copyright. Since 1978, the only requirement has been "fixation" of an original work "in a tangible medium of expression." 17 U.S.C. §102(a). Even though copyrighted works are thus protected from the date of their creation, it is the genius of the copyright system that copyright owners only profit by making their works available to others, so they (and their publishers) have an ongoing incentive to publish. Thus, while the particular expression may be protected, the ideas and facts and other noncopyrightable aspects of the works are made available to the public, as described at p. 22, *infra*.

The "quid pro quo" is for the volitional acts of creating and publishing works. If part of the social "contract" is that works ultimately go into the public domain, then that aspect of the "bargain" is something of an adhesion contract for the authors. They have no choice whether or when their works go into the public domain, and can hardly be said to have acquiesced to any particular duration for protection of their works.

To continue the contract analogy, the "contract" with the author is not something that comes to an end upon creation, or even upon first publication of a work. Rather, the rights and incentives are more in the nature of an executory contract, with ongoing incentives to continue to distribute the work for the entire period of the copyright owner's exclusive rights.

C. The plain meaning and logical understanding of the constitutional phrase is that it was directed at the creation and dissemination of works.

The Copyright Clause of the Constitution is the only enumerated power within Article 1, section 8, that mentions the "purpose" for which it was enacted. Why might the framers have chosen to add that language, instead of empowering Congress to grant exclusive rights to authors and inventors without limitation? Possibly, the framers were simply following the pattern of the prior state enactments. The "whereas" clauses in the preambles explained the purposes of the earlier statutes, but they can hardly be read as specific limitations upon the rights granted under those statutes.

The other model for the structure of the constitutional phrase was the Statute of Anne, adopted in England in 1710.[5] That act was entitled "An Act for the Encouragement

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[5] 8 Anne c. 19 (1710). Several briefs in favor of petitioners link the Statute of Anne to the prior history of monopolies under the Stationers' Companies licensing acts. As clarified in Edward Samuels, *The Illustrated Story of Copyright* (2000) at 16-17:

> Some modern critics of the expansion of copyright delight in emphasizing the embarrassing precursor to the Statute of Anne, suggesting that copyright has been forever tainted by the fact that it evolved from what were essentially censorship laws. However, there was a critical gap in protection, from 1694 through 1710, and the new Statute of Anne was not simply an extension of the previous law. Parliament seems not to have been guided by the complaints of the publishers, who in 1709 had lobbied for a return to the old licensing acts. Instead, they were obviously influenced by the pleas of several famous authors for the recognition of rights not of printers, but of authors. . . .

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of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." It is hard to imagine how the words "Encouragement of Learning" provided any particular limitation upon what rights were granted.[6]

Petitioners would have us believe that "Science and useful Arts" does not "Progress" until someone, such as petitioner Eldred, has made a work available to the public free of charge. But that certainly isn't the common sense meaning of "Progress of Science and useful Arts." Millions of works are created, published, read, and commented upon every year. Some of the greatest works receive

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> One way of putting the Stationers' Licensing Acts into perspective is to realize that they were not the spiritual precursors to copyright at all. However, because the crown and the publishers had found a way to protect the rights of publishers, and the publishers were accordingly willing to pay authors for their creations, a satisfactory solution had been worked out that eased the pressure for a more direct copyright law to protect authors. Once the stopgap measure was removed, the need for the protection of authors' rights came to the fore.

[6] As stated in H.R. Rep. No. 94-1476 to accompany S. 22 (the 1976 Act) at 133: "The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law." The petitioners and their amici supply dozens of quotes from one side of this debate to create the impression that there was general consensus on the shortest possible copyright term. One can only marvel at the audacity of Profs. Ochoa et al. in attaching to their amicus brief a 7-page appendix of an anonymous letter strenuously advocating one side of this debate almost 300 years ago. The "consensus" that actually developed over the years in this country, in England, and throughout the European Union is a copyright term of life plus 70 years.

accolades and criticism, and literary and other awards, shortly after their publication, for the contribution that they make to the arts and sciences. For example, the Nobel Prizes are awarded to those who "shall have conferred the greatest benefit on mankind." Under the Nobel rules, "To be eligible to be considered for a prize, a written work shall have been issued in print or have been published in another form." http://www.nobel.se/nobel/nobel-foundation/statutes.html. Pulitzer Prizes are awarded for "work done" and "published" or "performed" during the prior year. The public value of the works is hardly diminished by the fact that they will not go into the public domain for many years.

Authors who make "transformative" uses of copyrighted works should and do have wide leeway to produce their works under the fair use doctrine, as illustrated by this Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and the Eleventh Circuit's decision in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). Petitioners, however, are not such "creators" who desire to make transformative uses of existing works; instead, their businesses, for the most part, are in making already existing works available over the Internet or otherwise. While this may be a valuable service to some who use it, it does not result in any immediate "Progress" of "Science and useful Arts," since the works that they distribute are works that have already been published, almost all of which are already available (although of course for a fee) from other sources.[7]

[7] Many or most of the works that petitioners want to distribute are of course the "successful" works that are already available to the public. For example, Kahlil Gibran's *The Prophet*, which, we are told at p. 3 of

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III. U.S. statutes that extended the duration or altered the scope of copyright have applied the new terms to existing works, inconsistent with the novel theory proposed by petitioners.

A. The copyright act of 1790 applied to pre-existing as well as to prospective works.

The first copyright act, passed in 1790 in the first Congress, was entitled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." 1 Stat. 124. That act was inconsistent with petitioners' theory that Congress may not constitutionally extend the duration of existing works. Most states already had copyright laws that created exclusive rights for periods varying from a minimum of 14 to a maximum of 28 years. Under the 1790 act, the

petitioners' brief, Dover anxiously wants to publish, is already available in many editions, including a new hardcover copy on amazon.com for $10.50, or a paperback edition for $5.95. Some works are indeed out of print in this country; petitioners' intellectual property law professors' brief highlights the out-of-print status of H. G. Wells's 1933 novel, *The Shape of Things to Come*. However, they seem not to appreciate the ease with which copies even of out-of-print books can be obtained in the days of the Internet. Amazon U.K. lists a paperback edition for £4.79. Under this Court's ruling in *Quality King Distributors, Inc. v. L'anza Research International, Inc.*, 523 U.S. 135 (1998), it is not a violation of anyone's copyright to order individual copies of copyrighted works from other countries.

Indeed, under the first sale doctrine, copies of works that have been legitimately sold in this country may be resold, and even out-of-print works may be obtained at specialty sites such as abe.com ("Advanced Book Exchange"). As of the middle of June, 2002, abe.com listed 95 available copies of *The Shape of Things to Come*, including some for as little as $7, and 45 from U.S. sources for as little as $10.

authors of existing works, even if they had already received up to seven years of protection under the prior state laws (from 1783 to 1790), or even if their works might have gone into the public domain because they were from a state that hadn't yet passed an effective copyright law, were entitled to begin their copyrights anew under the 1790 statute.

B. Subsequent copyright acts that extended the duration of copyright are inconsistent with petitioners' novel theory.

All subsequent copyright acts that have extended the term of copyright – to a total of 42 years from the date of publication in 1831, 4 Stat. 436, 56 years from publication in 1909, 35 Stat. 1075, life of the author plus 50 years in 1976, 90 Stat. 2541, and life of the author plus 70 years in 1998, 112 Stat. 2827 – have specifically applied the extension to existing works. This application of new terms to existing works was not some incidental outcome, but was specifically considered by Congress. For example, in the 20 years of legislative history leading up to the 1976 Act, Congress carefully considered the varying means for measuring the term of copyright.[8] Although it adopted the

[8] There is some inevitable "disharmony" that results from measuring new copyrights from the date of the author's death, and measuring old, and some new, copyrights from the date of publication. Petitioners try to make much of the inevitable disparity. For example, they state at p. 3 that "As applied to an author who produced throughout a long lifetime in the pattern of Irving Berlin, the current rule would produce a term of 140 years." The statement is misleading. The 140 year term would apply only to such an author's early works; works produced shortly before an author's death would endure only for a little over 70 years under the CTEA.

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life plus 50 year term for works created after the effective date of the statute, Congress chose to continue to measure the term of existing copyrights (and works made for hire and pseudonymous and anonymous works) from the date of publication.[9]

Furthermore, Congress considered that it might be unfair to grant the benefits of the 19 year term extension to licensees who may have paid only for a shorter license term; accordingly, Congress established in section 304(c) an elaborate provision for "termination," or recapture, of the extension term for the benefit of the authors or their heirs. In this way, the term extension was not necessarily a "victory" for the large corporations that may have owned many of the copyrights, since in many cases they had to renegotiate the rights with the original authors or their heirs.

Under the 1976 Act, life plus 50 years actually resulted in a *shorter* duration of copyright for works produced toward the end of an author's life. Such works would be protected for a little over 50 years, less than the 56-year maximum under the 1909 law. Congress concluded that, *on average,* the life of the author plus 50 years was the equivalent of about 75 years from publication; but, of course, in individual instances, it might be more or less. That's the inevitable result of using two different methods for computing the duration of copyright. This disparity also accounts for much of the "disharmony" in international relations emphasized by the petitioners and several amici's briefs.

[9] The 1976 Act provided that anonymous works, pseudonymous works, and works made for hire would be protected for 75 years from publication, or 100 years from the date of creation, whichever expired first. The CTEA provides that such works are protected for 95 years from publication or 120 years from creation, whichever expires first. Petitioners can hardly complain about the 100- or 120-year periods from the date of creation, since those terms are much shorter than the rights "in perpetuity" that applied to unpublished works from 1790 through 1977. *See* this section, *infra*.

While Congress in 1976 extended the term of copyright for works that had already been published, it significantly decreased the term of protection for works that were not yet published. Under prior law from 1790 through 1977, state common law copyright in *unpublished* works had extended in perpetuity. Under the new act, Congress brought works under the federal system of copyright beginning from the date of "fixation" in a "tangible medium of expression" (rather than from the date of publication) and preempted state common law copyright in unpublished works. In section 303, Congress provided that copyright in previously created but unpublished works would be measured by the life plus 50 year term. However, in order to prevent "old" unpublished works from immediately going into the public domain, Congress provided that no such works would go into the public domain before December 31, 2002, at the earliest; and, to encourage publication of such "old" works, Congress provided that if such "old" works were published by the end of the year 2002, they would be granted additional protection until the year 2027. In any event, since the duration of copyright for unpublished works was reduced from "in perpetuity," and since some copyrights actually received a *shorter* term of copyright under the new Act (note 8, *supra*), the net effect of the 1976 Act was not simply to "extend" the term of copyright, but more precisely to "adjust" the term of copyright.

While Congress's prior enactments of course do not definitively decide the constitutional issue facing the Court, they do evince a practice of careful deliberation that has been clear and consistent from the first copyright act of 1790 to the copyright act of 1998. Each of these statutes, affecting the terms of existing as well as future copyrights, is inconsistent with the novel constitutional theory proposed by petitioners.

C. Other copyright acts have expanded the scope of copyrights, including existing copyrights, and are thus inconsistent with petitioners' novel theory.

Extension of the copyright term is not the only way in which Congress has expanded the scope of copyright over the years. To give just a few examples, owners of previously copyrighted works saw their rights expand when Congress added the right to receive payment under a compulsory licensing system for cable retransmissions in 1976 (17 U.S.C. §111); a public display right in 1976 (§106(5)); certain moral rights in 1990 (§106A); and digital performance rights in sound recordings in 1995 (§106(6)). Such additional rights could not possibly represent an incentive to the original copyright owners to create their works; and so, by petitioners' logic, Congress should never have been able to add to the rights in such works already in existence. Yet it is absurd to assume that Congress does not have the power to make periodic adjustments to the scope of existing copyrights.

Congress has "decreased" the public domain (in the sense that it has passed laws slowing the rate at which works go into the public domain) in many other ways besides the extension of the copyright term. For example, many more works traditionally went into the public domain as a result of failure to use the copyright notice, failure to register, or failure to renew, than have gone into the public domain because of expiration of copyright. (If, as petitioners assert, only 15% of copyrighted works were generally renewed, then 85% of the works went into the public domain when they were not renewed.) When Congress in 1988 eliminated the copyright notice and registration requirements as part of its obligations under the

Berne Convention, Article 5(2), and when in 1992 it provided for automatic renewal of copyrights still in their first terms, it "rescued" many more existing works from going into the public domain than it did when it passed the CTEA.[10] Again, by petitioners' logic, these "assaults" on the public domain should never have been allowed.

IV. The "Progress of Science and useful Arts" involves dozens of considerations beyond merely the devolution of copyrighted works into the public domain.

A. Congress should, or should certainly be entitled to, consider the international setting in deciding what constitutes the "Progress of Science and useful Arts."

One of the major accomplishments in U.S. copyright in the latter part of the twentieth century was the internationalization of copyright standards, prompted to a large

[10] Petitioners argue at p. 7, and repeat in note 13 on p. 30, that the problems they associate with the copyright term extension are compounded by the fact that "renewal" has been "automatic" since 1992. They argue that 375,000 copyrights have been "blocked" in order to "protect" 77,000 commercially viable works. (*But see* note 16, *infra.*) They then argue that "under current law," as a result of automatic renewal, "3.35 million works would be blocked to protect 77,000." That is a misleading characterization of the effects of the law. The 1992 amendment that made renewal automatic applies to works that were created between 1964 and 1977, inclusive. The only works created between 1923 and 1963 that were still under copyright, and therefore subject to the 1998 term extension, were those that were in fact renewed by the copyright owners. Those works published between 1923 and 1963 that were not registered for renewal already went into the public domain, and were not extended by the 1998 act.

extent by the internationalization of trade and technology. The 1790 act had protected only U.S. authors. It was not until 1891 that foreign authors were granted at least some minimal level of protection, although that protection, because of copyright formalities, was often more illusory than real. The situation was an embarrassment within the international copyright community, and undermined the ability of U.S. trade negotiators to encourage other countries to enhance their copyright protection of foreign – including U.S. – books, music, movies, and computer programs. Finally, in 1988, the United States joined the rest of the world by adhering to the Berne Convention. *See generally* Edward Samuels, *The Illustrated Story of Copyright* 230-48 (2000).

The Berne Convention provides that all member countries must protect copyright for a minimum term of life of the author plus 50 years, Berne Article 7(1), and eliminate all formalities as prerequisites to copyright, Article 5(2). The extension of copyright to life plus 50 years, as provided in the major overhaul of U.S. copyright law in 1976, and the elimination of formalities in the Berne Implementation Act of 1988, were therefore absolute prerequisites to U.S. adherence to Berne.

Not only does Berne require a term of life of the author plus 50 years, but it also requires that member countries grant that term to all works that have not already gone into the public domain in a particular country. As provided in Article 18(1): "This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection." Thus, the term extension for existing works still

under copyright protection was an absolute necessity for joining Berne under Article 18(1).[11]

The 1998 extension, from life of the author plus 50 years to life of the author plus 70 years, was not required under our international obligations. However, it was designed to match the term of copyright recently adopted throughout the European Union and by other countries. Under Article 7(8) of the Berne Convention, countries with the life plus 70 year term do not have to recognize the rights of foreign authors whose works have expired in their own countries.

Since the United States is a net exporter of copyrighted works, it certainly made sense for the United States to grant the longer term, and thereby allow U.S. authors to take advantage of the longer term available abroad.[12] And, since the United States was simply

[11] If the extension of copyright terms under the CTEA is unconstitutional, then the 1976 extension of the duration of copyright would presumably be void as well. That result would put the United States in violation of our obligations under Berne, with potentially disastrous international consequences. About the only way to distinguish the 1976 extension would be to uphold it under the treaty power of the Constitution. If that were done, however, then presumably the President could negotiate a term of life plus 70 years with the European Union countries, present the package to Congress as part of our international obligations, and reinstate the very provisions this Court is being asked to strike down. If the provisions can be reinstated in that way, will it have been worth the price in the form of the millions of transactions and billions of dollars that will have been upset by the decision?

[12] Although the laws of other countries may reflect different cultures and different histories, it is nevertheless instructive to consider how other nations have set about dealing with common problems of enforcing copyright in an emerging global technology. As

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matching the longer term available in other countries, it is not likely that Congress, absent the strong international considerations, will extend the U.S. term of copyright yet again. Petitioners' suggestion that Congress will continue to grant further extensions whenever the copyright industries ask for them is simply not a likely scenario.[13]

Petitioners suggest that the drafters of the Constitution would be horrified at a term of life plus 70 years, or 95 years for existing works. In 1790, the term of copyright adopted by Congress matched the British, and what would become the international, standard of the day. Would the framers of the Constitution be shocked to learn that Congress had, over the years, extended the term of copyright to match the expanding international norm? It is more likely that they would be shocked if we had not done so. Were Madison to view the state of international trade and technology today, he might well conclude, as he did about the individual state statutes in 1790, that one

stated by Justice Breyer in *Printz v. U.S.*, 521 U.S. 898, 977 (1977) (Breyer, J., *dissenting)* (in the context of the Brady Act):

> Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. . . . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . .

[13] Petitioners and several amici suggest that Congress passes whatever legislation the entertainment industries ask them to pass. This would come as news to these industries. For example, James Lardner documents how the movie industries were rebuffed by Congress in their efforts to get either a home taping royalty or an exemption from the first sale doctrine to cover movie rentals. *See generally* James Lardner, *Fast Forward: Hollywood, The Japanese, and the VCR Wars* (1987), at 187 and 218.

country "cannot separately make effectual provision" for copyright, and that most countries today have "anticipated the decision of this point" by passing laws in conformity with international standards. Cf. *The Federalist No. 43* (Gideon ed., George Carey and James McClellan, ed., 2001), at 222.

B. The "Progress of Science and useful Arts" includes many considerations other than the public domain.

Many of the major theories and limitations of copyright adopted over the years do in fact, and were intended to, promote the "Progress of Science and useful Arts." For example, this Court has noted the "First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use," *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 560 (1985).[14] Works of utility (§101, definition of "pictorial,

[14] The petitioners' intellectual property law professors' brief states at p. 26 that "One of the most troubling aspects of copyright in recent years is that the limitations on copyright liability, including the idea-expression distinction and fair use, have been steadily shrinking via judicial construction. . . . " This statement is absolutely wrong. While this Court held in the *Harper & Row* case that fair use did not authorize the taking of 300-400 words of an unpublished manuscript, this Court's clarification of the wide scope of fair use in a parody context, *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994) has been embraced by the lower courts. *See, e.g., Leibovitz v. Paramount Pictures Corp.,* 137 F.3d 109 (2d Cir. 1998) and *Suntrust Bank v. Houghton Mifflin Co.,* 268 F.3d 1257 (11th Cir. 2001). In the context of new technologies, this Court held in *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417 (1984) that fair use included the "time-

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graphic, and sculptural works") are not covered by copyright, but are free for the taking. The first sale doctrine (§109), the numerous compulsory licenses, the limitations in section 110 protecting various performances, the exclusion of protection for government works (§105), the limitation of copyright protection to "original works of authorship" (§102), the special rules for library photocopying (§108), the many definitional limitations in section 101, and the fact that copyright doesn't prevent all uses of copyrighted works, but only those enumerated in the exclusive rights sections 106 and 106A, all in their own way foster the "Progress of Science and useful Arts."

Sometimes it is by limiting rights, and sometimes it is by granting rights, that the arts "progress." As viewed by Madison and other framers of the Constitution, p. 8, *supra*, the rights of copyright owners were largely aligned with, not opposed to, the progress of science and useful arts. As stated by Justice O'Connor in *Harper & Row, Publishers,*

shifting" of television programs through the use of home video recorders. This Court's holding in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.,* 499 U.S. 340 (1991), while not an "idea/expression" case, was founded upon the related fact/expression distinction. *Computer Associates Int'l, Inc. v. Altai, Inc.,* 982 F.2d 693 (2d Cir. 1992) and similar cases have resulted in a "thin" copyright for computer programs, based upon concepts related to the idea/expression distinction and the works of utility doctrine. The holding in *Recording Ind. Ass'n of America v. Diamond Multimedia Systems, Inc.,* 180 F.3d 1072 (9th Cir. 1999) that the Digital Millennium Copyright Act did not apply to the popular RIO MP3 music player, while decided on the technicalities of that statute, was a major victory in what might be considered a fair use context. It's hard to imagine how the petitioners' copyright law professors can conclude that the basic limitations of copyright have not been doing their historical job of balancing the rights of copyright owners and users.

Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985), "[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas. . . . " There is hardly a principle of copyright that does not reflect a careful balance between the rights of copyright owners and copyright users. It is presumably precisely because the balance is so intricate and delicate that the framers of the Constitution assigned to Congress the task of setting copyright policy.

Although the issue before this Court does not directly involve the Internet or other new technologies, petitioners and several amici in favor of petitioners suggest that their interests are allied with the Internet, and that a decision against them will somehow inhibit the development of this new technology. At pp. 5-6 of their brief, for example, petitioners suggest that Mr. Eldred's website is simply the Internet equivalent of a public library, and that he should be entitled to some online equivalent of the first sale doctrine.

If Mr. Eldred wants to "compile" a "collection" of Robert Frost books, he is perfectly free to do so under the first sale doctrine. But if petitioners think that posting HTML versions of those works on their Internet website is or should be the online equivalent of the Derry New Hampshire Public Library's lending of a particular copy to members of their community, then they are fundamentally wrong. The Derry library maintains individual copies of their books; when they are lent out, they are unavailable to others. Works that are "posted" on the Internet, on the other hand, can be viewed simultaneously by hundreds or

thousands of users, copied instantaneously to their computers, and redistributed in multiple copies around the world. As demonstrated by the Audio Home Recording Act of 1992, the Digital Performance Right in Sound Recordings Act of 1995, and the Digital Millennium Copyright Act of 1998, the proper Congressional response to the digitization and posting of works is not a blanket exemption, but a careful balancing of interests. Even with the first sale doctrine, libraries are also subject to the elaborate provisions of section 108 to ensure that their copies are not systematically used to make copies of works.

If petitioners want a "first sale" equivalent for the Internet, they'll have to convince Congress of its advisability. Their ability or inability to get a special exemption during the life of a particular copyright, however, should have nothing to do with the issue before this Court: whether Congress acted within its constitutional authority when it extended the duration of copyright in the CTEA.

C. The CTEA incorporates many provisions designed to achieve an overall balance between the interests of copyright owners and copyright users.

In enacting the CTEA, Congress again gave careful consideration to balancing the interests of copyright owners and copyright users. For example, Congress coupled copyright term extension with the so-called "Fairness in Music Licensing Act," which, in amending section 110(5) and adding section 513, put limitations on the enforcement of public performance rights by music copyright holders. Responding to the concerns raised by library representatives, Congress added a new subsection 108(h), which provides for an expanded library exemption

for the reproduction of copyrighted works during the last 20 years added by the act.

As explained at p. 16, *supra*, "old" unpublished works were slated to go into the public domain after December 31, 2002. As originally proposed, the CTEA would have extended the protection of such works by an extra ten years. S. Rep. No. 104-315 to accompany S. 483 (1996) at 5-6. Responding to the concerns raised in the committee hearings, however, Congress determined that no extension should be given for the protection of these works (although Congress did extend by 20 years, to 2047, the "extra" protection granted to such works as an inducement to get them published by the end of 2002). Thus, thousands, or millions, of unpublished works, including private letters dating back to the early history of the United States, will first go into the public domain after December 31, 2002, demonstrating Congress's sensitivity to the value of the public domain.

As with the 1976 term extension, Congress was concerned that the authors or their heirs, rather than the copyright licensees, be the ones to receive the benefit of the 20 year term extension. Accordingly, Congress provided a new termination right in section 304(d) for authors or heirs who did not previously take advantage of the termination provided in section 304(c).

Congress did not provide, either in 1976 or in 1998, for a termination right in works made for hire. However, in the CTEA, Congress did take the extraordinary step of adopting a sense of Congress that owners of audiovisual works should make arrangements to share the value of the additional 20 year extension with those who participated

in the creation of the works. Section 105 of the CTEA provides:

> It is the sense of the Congress that copyright owners of audiovisual works for which the term of copyright protection is extended by the amendments made by this title, and the screenwriters, directors, and performers of those audiovisual works, should negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements with respect to the establishment of a fund or other mechanism for the amount of remuneration to be divided among the parties for the exploitation of those audiovisual works.

Although this sense of Congress does not have the force of law, it presumably puts the industry on notice that, should such negotiations not be forthcoming, Congress might consider enacting legislation to force the copyright owners to share the benefits of the copyright term extension (assuming, of course, that this Court doesn't bar Congress from making ongoing adjustments to existing rights of copyright).

D. Although Congress has considered many factors in promoting the "Progress of Science and useful Arts," it has never embraced a strict economic efficiency analysis.

The petitioners' economists' brief begins with the statement, at p. 2: "One possibility is that Congress sought a policy that confers a net economic benefit, after subtracting the expected costs." But, despite the attempts by some scholars to test all copyrights on the Procrustean bed of economic efficiency analysis, Congress has simply never limited itself to such an approach. The moral rights

provided in section 106A, the termination rights of sections 203 and 304(c), and dozens of other rights and limitations don't lend themselves to economic evaluation. One might just as easily suggest that copyright is based upon a natural rights or property rights[15] theory. The pre-1790 statutes, in their preambles, make reference to "natural rights" and "property rights."

One of the basic problems with an efficiency analysis of copyright is that many of the variables involved in the copyright industries simply are not quantifiable. For example, in making the argument that increased revenues for the copyright industries will not result in any greater investment in future works, the economists blithely suggest at p. 9 of their brief that "In general, a profit-maximizing producer should fund the set of projects that have an expected return equal to or greater than their cost of capital." One is reminded of the proverbial critic who, upon being told that only one out of ten movies makes money, responded, "Then only invest in the ones that make money." Of course, if one knew in advance which multimillion-dollar movies would be successful, one would have no difficulty making money.

The fact is that the copyright industries are based upon products that usually have, at the outset, an undeterminable value. One book sells, another doesn't; one movie is a

[15] When it serves their interests, petitioners are not averse to using a property law analogy. "Copyright law had, in effect, vested in these petitioners, as well as in the public, a remainderman interest in the works at stake." Petitioners' brief at 6. Of course, a remainderman is only "one who is entitled to the remainder of the estate after a particular estate carved out of it has expired." *Black's Law Dictionary* (abridged 6th ed., 1991).

blockbuster, the other a disaster. If one were to do an economic analysis, one would probably conclude that, given the unlikelihood of success, it is hardly ever worth publishing a book or producing a play or a movie. It is precisely because the chance of success is so small that we have to make the reward for success great.[16] The copyright industries are made up, to a large extent, of what the economists call "sub-par projects," and it would be a mistake to leave to the economists the choice of which works to subsidize.

[16] Petitioners at p. 7 make an argument similar to that contained in the economists' brief, that the "cost" to society of "withholding" lots of copyrighted works exceeds the "gain" to be realized by those few copyright holders who have "surviving works" (defined by petitioners as "works that continue to earn a royalty"). The argument is fallacious.

The petitioners effectively divide all works into two categories, those that have commercial viability, and those that don't. For those that don't have commercial viability after dozens of years – the vast majority of works – there really isn't much "cost" in tying them up in copyright or otherwise. We might as well leave them in the control of people who have a sentimental or other noncommercial interest in them, since such people are more likely to preserve or disseminate the works. The works that second-comers are most interested in reproducing, however, are precisely the same "surviving works" that have commercial viability to the original creators or their heirs. Assuming that a given work has some remaining commercial viability, then, it is a worthwhile question to ask: is it more "fair" to grant whatever value there may be to the creators, their heirs, or the company that absorbed the initial cost and took the initial risk in creating the work, or to pass the remaining commercial value to the free-rider who waits until a work's commercial success is proven, and then jumps in to take advantage? But, of course, economic analysis doesn't factor in what is "fair." Maybe that's why Congress doesn't particularly limit itself to economic analysis in deciding who should control the further dissemination of creative works.

CONCLUSION

The various extensions of copyright over the years, balanced by careful limitations on the rights of copyright owners, are not the result of some nefarious scheme by corporations to cheat the public of their rights. Rather, they are part of the remarkable system envisioned by the framers of the Constitution, and implemented by the Congress and the President, to "promote the Progress of Science and useful Arts" by doing exactly what the Constitution says they are supposed to do, "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." As argued by Ralph Oman, Former Register of Copyrights, in a letter to the editor of the *Washington Post* on March 11, 2002, p. A20, authors went along with the various exceptions and limitations on their rights because of the "promise of a longer term of protection. It would be a switch-a-roo worthy of Lucy yanking away Charlie Brown's football if the Supreme Court removed the carrot and left the authors with the dirty end of the stick."

This Court should not accept petitioners' novel theory that would limit Congress in its ability to continue balancing the interests of copyright owners with the interests of copyright users. The decision of the District of Columbia Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 01-618

In the
Supreme Court of the United States

ERIC ELDRED, ET AL.,
Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* OF THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL (NSAI) IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

This brief *amici curiae* in support of respondent is submitted by The Nashville Songwriters Association International (NSAI) pursuant to Rule 37 of the Rules of this Court. NSAI, with nearly 5,000 members, is the world's largest not-for-profit songwriter trade organization, and was an active participant in the legislative process which led up to the passing of the Sony Bono Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (1998). NSAI was founded in 1967 and is incorporated as a not-for-profit organization in Tennessee.

> NSAI *consists of a body of creative minds, including songwriters from all genres of music, professional and amateur, who are committed to protecting the rights and future of the profession of songwriting, and to educate, elevate, and celebrate the songwriter and to act as a unifying force within the music community and the community at large.*

NSAI mission statement.

Among its many activities, NSAI operates workshops to educate and develop amateur songwriters throughout the U.S. and Canada. Although many of its members are famous songwriters, the majority of NSAI's members are songwriters

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[1] Counsel for Respondent and Petitioners have consented to the filing of this brief and their consent letters have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or the Counsel of Record, made a monetary contribution to the preparation or submission of this brief. Amici Curiae recognizes and thanks Bart Herbison, Executive Director of NSAI and Brian Casper for their contributions to the preparation of this work.

that are probably unfamiliar to this Court. Song writing is a difficult career taking incredible dedication, hard work, and a faith that what you create today, will sustain you and your family in the future. The members of NSAI are proud to be songwriters. They are deeply concerned that if this Court overturns the CTEA it will discourage and regress the progress of science and the useful arts. NSAI is relying on this Court to protect their interests in today's global economy.

While the NSAI takes the position that the CTEA does not violate the First Amendment, it will only comment herein on the first question presented: *Whether the D.C. Circuit Court of Appeals Erred in Holding that Congress has the Power under the Copyright Clause to extend retrospectively the term of existing copyrights.*

INTRODUCTION

In passing the CTEA, Congress considered the longstanding recognition that laws require change and amendment as dictated by changes in the world in which they operate. NSAI asks this Court to consider the following quote from Thomas Jefferson:

> I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy....

Intellectual Property and the National Information Infrastructure: the Report of the Working Group on Intellectual Property Rights 13 (September 1995) [hereinafter *IPNII]* (Inscription at the Jefferson Memorial).

In passing the CTEA, Congress determined that "the coat [was] getting a little tight." *Id.* at 212. Congress decided that in order to progress American arts, the term of protection for subsisting works needed to be extended. Congress adjusted the "coat" to fit the growth of today's American authors, who like the majority of Americans are more educated, enlightened and have a more sophisticated understanding of their rights. Congress also adjusted the coat to fit the worldwide entertainment industry and the need to maintain the United States' competitive advantage in the global marketplace.

SUMMARY OF ARGUMENT

Past extensions, the views of the framers, case law, and the terms of the Constitution show that Congress had the power to enact the CTEA, and to retrospectively extend the term of protection for existing works. By its enactment Congress maintained the United States' position as the home of the greatest authors in the world, and directly benefitted the specific class of individuals meant to be protected by Article 1, §8, clause 8 of the Constitution — authors. Congress did not simply decide to award Hollywood with an undeserved windfall. Congress promoted and progressed the art form of songwriting and the human condition of America's authors.

Petitioners mistakenly equate the public domain with the public good. The public domain is but one element considered in determining the public good. Only Congress can determine the appropriate balance between the interests of authors and the public. Congress advanced the public good by encouraging and rewarding authors.

Congress did not arbitrarily choose to extend the term of protection for existing works, nor did Congress make copyright protection perpetual. By extending the term of protection for existing works, Congress promoted the progress of science for the following non-exhaustive reasons: (i) international term harmonization and the encouragement of global licensing of American songs; (ii) sustaining our copyright trade surplus; (iii) greater access to literary works; (iv) expansion of exceptions and limitations to copyright; (v) author incentives and rewards; (vi) reinvestment in the creation of new works, and greater dissemination and preservation of existing works; (vii) providing greater employment for authors; (viii) quality control for existing works; and (ix) the funding of foundations which encourage writing.

ARGUMENT

I. THE COURT DID NOT ERR IN HOLDING THAT CONGRESS HAD THE POWER UNDER THE COPYRIGHT CLAUSE TO EXTEND RETROSPECTIVELY THE TERM OF EXISTING COPYRIGHTS; CONGRESS DOES HAVE, AND HAS ALWAYS HAD THE POWER TO RETROSPECTIVELY EXTEND THE TERM OF EXISTING COPYRIGHTS.

The Constitution gives Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" U.S. CONST. art. 1, § 8, cl. 8.

A. Past Extensions And The Views Of The Framers Make Congressional Power Clear.

Congress has always had the power to extend retrospectively the term of existing copyrights. It has done so without challenge in every significant copyright extension to

date. Prior to 1998, Congress extended the term of copyright protection for new and subsisting copyrighted works in 1831, in 1909 and in 1976.[2] In 1790 the First Congress provided copyright protection for works "already printed" as well as for those that would be "thereafter made and composed."[3] This alone should be dispositive. The men who wrote the Constitution recognized that the incentive to create is promoted by protecting works already created just as much as the protection of works yet unborn. The construction of the Constitution "by [those] contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed [for this long], it is almost conclusive." *Eldred v. Reno*, 239 F.3d 372, 379 (2001) (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884); *see also*, *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (an act "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.").

James Madison, a principle drafter of the Copyright Clause, observed without objection, the Congressional term

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[2] Act of Feb. 3, 1831, §§1-3, 4 Stat. 436-37; Act of Mar. 4, 1909, §24, 35 Stat. 1075-88; Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§101 *et seq.*).

[3] Act of May 31, 1790 § 1, 1 Stat. 124. Petitioners argument that the 1790 extension as to existing works under the laws of the states, is not equivalent to an extension of federally protected existing works, is a red herring. Congress brought state law copyrights under federal control and extended those terms as necessary to harmonize term protection in the U.S. Accordingly, the state works became federal works and as existing federal works, their term was extended.

extension for existing works which occurred in 1831. Madison understood the value of copyright to an author and his heirs, and that copyrighted works grow more valuable with time. In his letter to Samuel Smith of February 2, 1827, Madison responded to a request that he publish his notes of the proceedings of the Revolutionary Congress and the General Convention of 1787. "Hardly a year passed from the close of the Convention to the day of Madison's death that he was not urged to publish the notes he had taken as semi-official reporter." Adriene Koch, *introduction* to NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at viii (Reported by James Madison). In the letter he stated "the older such things grow, the more they are relished as new; the distance of time, like that of space, from which they are received, giving them that attractive character." *Id.* at ix. In fact, Madison's notes were not published until after the 1831 term extension had taken place. In his will he bequeathed the rights, including the expected income from the sale of his notes to his wife. *Id.*

B. This Court Has Made Clear That Congress' Power Under The Patent And Copyright Clause Is Almost Absolute.

This Court has made clear that "the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure." *McClurg v. Kingsland*, 42 U.S. 202, 206 (1843). Congress' power to legislate upon the subject of copyrights is clearly the same.

"[A]s the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors and inventors in order to give the appropriate public access to their work product;" [that] "task involves a difficult balance

between [competing interests]." [Thus,] "our patent and copyright statutes have been amended repeatedly." *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984); *see also*, *Stewart v. Abend*, 495 U.S. 207, 230 (1990). ("Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces [in exercising its copyright power] . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve.").

The CTEA extension was originally recommended by the executive branch after careful study by the Secretary of Commerce. *See*, *IPNII*, *supra* p. 2. Congress spent over five years listening to testimony, commissioning reports and deliberating the proper balance of interests for this new age.

In *Sony*, this Court wrote of the difficulties faced in finding the "balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." 464 U.S. at 429. This Court made it clear that the Constitution assigns this task to the legislative branch. *See*, *id.* The balancing of these conflicting interests is purely a matter of public policy. This Court has noted that the fluidity of this balance has been recognized since the advent of the printing press.[4] Sound principles council against the courts deciding these types of policy issues in the guise of constitutional

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[4] *See*, *Sony*, 464 U.S. at 429 n. 12. ("Copyright protection became necessary with the invention of the printing press and had its early beginnings in the British censorship laws...Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammeled dissemination of ideas." (quoting B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT vii-viii (1967)).

interpretation.[5] The constitution has vested this power in Congress precisely because it is best suited to make these decisions. The judiciary is not apt to do what is necessary to strike the balance. Moreover, judge made law is not as readily malleable in the face of technological and social change.[6] Congress balanced substantial evidence pro and con while drafting and voting on this legislation. With that evidence before them, it was reasonable for Congress to determine that the benefits of a longer term outweighed the costs to the public.

C. The CTEA Does Not Violate The "Limited Times" Requirement, And This Court Has Made Clear That It Is For Congress To Decide What Is A "Limited Time."

Petitioners argue that what makes the CTEA unconstitutional as opposed to prior extensions of existing copyrights is that enough is enough — that when all of the

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[5] "[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992) (Scalia J., concurring in part and dissenting in part (quoting *Dred Scott v. Sandford*, 60 U.S. 393, 621 (1857) (Curtis J., dissenting)).

[6] *See*, Sony, 464 U.S. at 431 ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.").

extensions over the history of the U.S. Copyright Act are combined, Congress is providing for perpetual protection piecemeal, and is going beyond the textual limitation of the Copyright Clause that exclusive rights only be granted for "limited times." *See,* Pet. at 18. However, the CTEA's twenty-year extension is by definition for a limited time. Petitioners also argue that absent the requirement that Congress "promote the Progress of Science" there would be no Copyright Clause reason to restrict Congress' power over the public domain. Pet. at 12. Yet, the only Copyright Clause restriction on Congress' power over the public domain is in the words "limited times." Petitioners admit, there is no public domain clause in the Constitution. *Id.* The only Copyright Clause reason for a requirement that some public domain exist is implied by the words "limited times." *See*, U.S. CONST. art 1, § 8, cl. 8. Accordingly, the scope of the public domain is to be determined by the Congressional policy of what constitutes the appropriate "limited times."

Petitioners misread *Graham v. John Deere Co.*, 383 U.S. 1 (1966). The question before the Court was "what effect the 1952 Patent Act had upon traditional statutory and judicial tests of patentability and what definitive tests were then required." *Id.* Nowhere in *Graham* was the issue of "limited times" or the scope of the public domain addressed. Petitioners suggest that in order for Congress to act in any way under the Copyright Clause, the action must "promote the progress of science." Pet. at 19. However, this introductory language is not a limit on Congressional power but is merely "conclusory, reflecting the belief of the framers of the Constitution that to grant exclusive rights would promote the progress of science." *See*, WILLIAM F. PATRY, I COPYRIGHT LAW AND PRACTICE 124 (1994); *cf.* MELVILLE NIMMER & DAVID NIMMER, I NIMMER ON COPYRIGHTS § 1.03 (2001). The only inherent requisite this Court mentioned in

respect to the Constitutional command to "promote the Progress of Science and the useful Arts" was that of "Innovation, advancement, and things which add to the sum of useful knowledge." *Graham*, 383 U.S. at 5. Even if this language could be analogised to reflect a standard of copyrightability, its breadth does not address duration of protection.

The internal logic of *Graham* poses no problems for the CTEA.[7] This Court stated that "Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose." *Graham*, 383 U.S. at 6. However, in explaining the scope of this restraint, this Court emphasized that Congress has broad discretion. *Id.* ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which *in its judgment* best effectuates the constitutional aim.") (emphasis added).

Additionally, this Court has made it clear that it is the role of Congress to determine the scope of what constitutes the most appropriate "limited times." *See*, *Pennock v. Dialogue*, 27 U.S. 1, 16-17 (1829) (this exclusive right shall exist but for a limited time, and that period shall be subject to the discretion of Congress); *see also*, *Sony*, 464 U.S at 429.

D. New Originality Is Not Required To Extend Copyright Protection For Existing Works.

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[7] Additionally, the retroactive extension of the copyright term did not effect any works already in the public domain. By definition, the works covered under the existing term were not "already available." Because of the idea/expression dichotomy, copyright never removes any existing knowledge from the public domain. It merely postpones the legal piracy of a particular way of expressing that knowledge.

Petitioners' reliance on *Feist Publ'ns v. Rural Tel. Ser. Co.*, 499 U.S. 340 (1991) and *Harper & Row v. Publishers v. National Enters.*, 471 U.S. 539 (1985) to argue that the requirements of "originality" restrict Congressional power to extend the term of copyright for existing works is completely misplaced. *See*, Pet. at 32-33. Their sole authority for this interpretation is a quote from *Feist* taken out of context. Petitioners claim that *Feist* "characterized material 'in the public domain' as 'not original.'" *Id.* citing *Feist*, 499 U.S. at 350 quoting *Harper*, 471 U.S. at 548 ("copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original — for example . . . materials in the public domain."). However, this quote does not mean that works in the public domain are not original. This Court was speaking of constituent parts that are not original to a prior authors work.

These cases do not stand for the proposition that works in the public domain are not original, nor for the proposition that in order to extend term protection for existing works some "new originality" must be found.

Harper and *Feist* stand for the proposition that even compilations of facts, or historic recollections can be protected by copyright if they have some modicum of originality. *See*, *Feist*, 499 U.S. at 346. But those portions that are not part of the author's original creation are not protected. *Id.* at 350-51. These cases say nothing at all about the originality of the public domain.

E. The Public Good And The Public Domain Are Not One In The Same. The Constitution Specifically Protects Authors. Nowhere Is The Public Domain Mentioned Except Implicitly By The Language "Limited Times."

1. The encouragement of individual effort by personal gain is the best way to advance public welfare.

Copyright is a balance – authors' interests along side the public's interest. However, the public domain is just one element of what is considered in support of the public good. The public domain should not be balanced with a weight even remotely equivalent to that of the interests of authors. Instead, one must ask, to what extent does the public benefit when literary works enter the public domain? This Court has provided the answer: "The economic philosophy behind the [copyright] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare...Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

2. Musical works are more accessible to the public when they are protected by copyright than when they fall into the public domain.

In practice, commercial music users prefer to rely upon copyright protection. Most film and television production companies prefer to license a copyrighted song rather than use a public domain song. *See*, AL KOHN & BOB KOHN, ON MUSIC LICENSING 783 (3d ed. 2002). The reason is liability. If users license a song from a publisher, that publisher represents and warrants that it has the rights to the song. *See*, *id.* at 594. Licensing a copyright protected song takes the production company off the hook. *See*, *id.* at 783-84. Film and television producers require worldwide rights. It is of little value if a song is in the public domain in one country, when it is still protected in another country.

Companies that publish public domain works usually sell them at or above the price of contemporary works of the same genre. Blockbuster Video rents *It's a Wonderful Life* for the same amount as the rest of its classic movies, even though it entered the public domain in 1974.[8] "Once a work falls into the public domain there is no guarantee that the work will be more widely available or cheaper." *Hearing on S. 483*, *supra* note 8 (statement of Bruce Lehman, Assistant Sec. of Commerce and Comm'r of Patents and Trademarks). When publishers of public domain works sell them to the public at or around the same price as copyrighted works, they reap a windfall by not having to pay royalties. With these higher profit margins there is no reason they cannot pay for the occasional license or royalty fee.

3. Petitioners are merely attempting to transfer wealth from authors and authors' heirs into their own pockets.

Petitioners have made clear that they are authors of derivative works. Pet. at 5. Authors of derivative works (even derivatives of public domain works) have rights in their unique arrangement, selection, and in any new original work that they may introduce into the public domain work. *See*,

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[8] *See*, *Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Judiciary Comm.*, 104th Cong. (1995) [hereinafter Hearing on S. 483] (testimony of Alan Menken: "This is MOBY DICK, written by Herman Melville in 1851 . . . This is THE CHAMBER, written by John Grisham in 1994. The price of MOBY DICK is twelve dollars and ninety-five cents. The price of THE CHAMBER is seven dollars and fifty cents. The publisher of MOBY DICK pays no royalties to the Meville Estate, while John Grisham of course, derives royalties from the sale of his book. However, no benefit is passed on to the consumer from the sale of MOBY DICK — only the publisher benefits."

Feist, 499 U.S. at 348. Accordingly, once a work falls into the public domain, it is not free to the public because users must still pay the owner of the derivative version of the work. Petitioners reason for challenging the CTEA is clear — they want to transfer the royalty payments that are currently being paid to authors and their publishers into their own pockets.

4. Without copyright ownership, there is insufficient incentive to actively promote and develop older works, which results in new generations losing access.

Last year's Grammy Award winner for "Album of the Year" was the "O Brother Where Art Thou" movie soundtrack. *See*, Ray Waddell, *Down From The Mountain Upping Its Profile*, BILLBOARD (Mar. 23, 2002). It is a prime example of older and lesser-known music that found a new generation of listeners. This was due to the fact that the copyright owners had a financial incentive to exploit and market their works. As is industry practice, the film's music supervisors contacted music publishers requesting the genre of songs they thought would fit the film. DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 395 (1994). Publishers of early bluegrass music responded to the requests, and the result has been a resurgence in bluegrass music, a cultural treasure that the public had all but lost.

The songs used in the film have financially benefited their authors and heirs, including NSAI members Jimmie Davis ("You Are My Sunshine"), A.P. Carter ("Keep on the Sunny Side"), Albert E. Brumley ("I'll Fly Away") and Jimmie Rodgers ("In the Jailhouse Now"). Had these songs gone into the public domain, the publishers would likely have discarded them from their libraries. These songs would not have been included in the sets of songs sent to the film's music supervisors absent the publishers' ownership.

F. The CTEA Is Not Perpetual Protection Piecemeal, The Development Of Copyright Law Is An Ongoing Domestic As Well As International Process.

International standards have always been a guiding force in the development of U.S. copyright law.[9] All of the significant U.S. copyright term extensions were due to higher protection in the international community, and a desire to treat American authors equally as well as their foreign counterparts.

The first copyright act of 1790 was based on the British Statute of Anne. *Compare*, Act of May 31, 1790, 1 Stat. 124, *with* 8 Anne, ch. 19, 1710. The next extension occurred in 1831 due to higher protection internationally. REPORT OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, 7 Reg. Deb., app. c xix (Dec. 17, 1830). The stated purpose of the 1831 extension was "to enlarge the period for the enjoyment of copyright, and thereby to place authors in this country more nearly upon an equality with authors of other countries." *Id.* The extension of 1909 was also due to higher international term protection. S. REP. NO. 59-6187 at 7 (1907). The term of copyright protection was extended again in 1976 to meet international standards. H.R. REP. NO. 94-1476 at 135 (1976). So it is no surprise that in 1998, in the midst of the information age and the global economy, Congress again felt that American authors should receive term protection at least as strong as their foreign counterparts. *See*, H.R. REP NO. 105-452 at 4 (1998).

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[9] The CTEA was not a stand-alone piece of legislation. It was considered and recommended along side the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, § 404, 112 Stat. 2860 (1998). The overriding impetus behind the DMCA was also international in scope, to comply with U.S. obligations under the WIPO Treaties.

The CTEA is not perpetual protection piecemeal. Petitioners claim that Congress has extended the term eleven times in the last forty years. Pet. at 2. However, this is misleading. Nine of the last eleven extensions were merely placeholders designed so that works would not fall into the public domain while Congress was deliberating what became the 1976 Copyright Act. *See*, H.R. REP. NO. 94-1476 at 47-49. Congress spent over twenty years fine-tuning the 1976 Act before it became law. *See*, H.R. REP. NO. 94-1476 at 47. By 1965 it was apparent that the term was going to be extended to life plus fifty years. *See*, *id*. In reality, only two term extensions have been enacted in the last forty years, and only four in the last two hundred.

The term chosen was not arbitrary. It was specifically chosen to harmonize the term of protection under American copyright law with that of the European Union. *Hearing on S. 483*, *supra* note 8. (statement of Comm'r Lehman) ("The primary reason for changing the copyright term by twenty years [was] to bring U.S. law into conformity with that of the European Union.")[10]

Jonathan Tasini[11] explained to Congress that the overriding issue in term extension was global harmonization

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[10] Petitioners' claim that the CTEA actually disharmonized international copyright term is completely uninformed as it compares mostly third world countries with those of the world's most powerful nations. Pet. at 43. If America is to be a leader, or intends to at least compete in the global economy of intellectual property, it should not aspire to match the type of protection afforded by countries such as Kazakstan, Liechtenstein, Qatar, Paraguay and Malawi.

[11] Tasini was a successful plaintiff in *N.Y. Times v. Tasini*, 533 U.S. 483 (2001).

which was underscored by the EU's term extension of 1993. Prior to 1998 the U.S. term was the shortest possible under the Berne Convention, which adopted its minimum at a time when life expectancy was approximately 52 years. He explained that with life expectancy averaging 76 years, the current term did not allow an author's heirs to enjoy the economic benefit of a work. S. REP. NO. 104-315, at 146-47 (1995) (Letter from National Writers Union, Jonathan Tasini, President).

In today's global economy, harmonization of the term of protection for literary works is imperative for the smooth operation of licensing and other business transactions. If the U.S. provides weaker copyright protection than other first-world countries, it may create an incentive for America's greatest writers to take citizenship elsewhere. The U.S. should be focused on retaining its great writers and on attracting the world's greatest talent to become Americans.

G. Congress Reasonably Extended The Term For Existing Works In The Interest Of U.S. Trade And Considered The Rule Of The Shorter Term.

The United States has seen unsurpassed growth in the foreign consumption of its creative products. *See generally*, STEPHEN E. SIWECK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY THE 2002 REPORT (2002) [hereinafter SIWECK]. Congress acted in light of this growth when it advanced the copyright law to "keep pace with the times." Congress recognized that the U.S. has international obligations to protect copyright under the Berne Convention. Pursuant to the Convention's rule of the shorter term, member countries are only obliged to protect the work of foreign authors to the same extent that they would be protected in their own country. Congress knew that failure to extend our copyright term would cost the U.S. millions of dollars in export revenues,

and that our balance of trade would suffer commensurately. *See*, 144 CONG. REC. H1459 (daily ed. March 25, 1998) (statement of Rep. Howard Berman).

Senator Orrin Hatch stated:

> America exports more copyrighted intellectual property than any country in the world, a huge percentage of it to the nations of the European Union. Intellectual property is, in fact, our second largest export; it is an area in which we possess a large trade surplus. At a time when we face trade deficits in many other areas, we cannot afford to abandon 20 years worth of valuable overseas protection.

Hearing On S. 483, *supra* note 8.

In 1994, the U.S. copyright industry contributed approximately $40 billion in foreign sales to the U.S. economy and stood as a net exporter of intellectual property products to the EU. Congress reasonably determined that an additional twenty years of protection would likely increase the trade balance of the U.S. *Id.* (statement of Comm'r Lehman).

This economic reality continues to the present time. In 2001, the U.S. copyright industries accounted for 5.24% of U.S. Gross Domestic Product (GDP), or $535.1 billion. *See*, SIWECK, *supra* p. 15 at 3. Over the last 24 years (1977-2001), the U.S. copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy (7.0% vs. 3.0%). *Id.* at 4. Between 1977 and 2001, employment in the U.S. copyright industries more than doubled to 4.7 million workers, which is now 3.5% of total U.S. employment. *Id.* In 2001, the U.S. copyright industries achieved estimated foreign sales and exports of $88.97 billion, again leading all major industry sectors. *Id.*

This Court should not overrule the clear Congressional policy decision that the extension of term protection for subsisting works is good for U.S. trade.

H. In Enacting The CTEA, Congress Did Not Merely Extend The Term Of Copyright. It Balanced Users' Interests By Significantly Cutting Back The Rights Of Copyright Owners.

Copyright is often characterized as "a bundle of rights." While the sticks in the bundle may appear to be getting longer, constant legislative chipping-away, is also making them thinner. In 1998, Congress significantly cut back the rights of copyright owners. The history of American copyright legislation shows a clear trend of cutting-back copyright rights. Congressional balancing between the rights of authors and users is a continuous process.

The cut-back in 1998 of most significance to American songwriters was the Fairness in Music Licensing Act (FMLA), Pub. L. No. 105-298, 112 Stat. 2827 (1998) (title II of the CTEA). Restaurant and bar owners lobbied Congress—just as the Petitioners could now—to obtain the free use of music. *See*, 144 CONG. REC. H1457 (March 25, 1998) (comments of Rep. Sensenbrenner). The FMLA gives an exemption to small businesses and restaurants from paying performance royalties on music played from radio or television to their customers. 17 U.S.C. § 110 (2001). This cut-back has had a substantial economic impact on authors and publishers.

Additionally, a new fair use provision was added for libraries and archives for purposes of preservation, scholarship, or research. 17 U.S.C. § 108 *amended* by the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, § 404, 112 Stat. 2860, 2889 (1998). Online service providers were exempted from liability for infringements. 17

U.S.C. § 512. Non-profit educational institutions were exempted from liability for infringements by faculty members and graduate students. *Id.* An exemption for computer maintenance and repair was created. *See*, 17 U.S.C. § 117 *amended* by DMCA § 302, 112 Stat. at 2887. A statutory license was granted to traditional analog broadcasters to make non-subscription webcasts. 17 U.S.C. § 112 *amended* by DMCA § 402, 112 Stat. at 2888. Broadcasters were exempted from liability for making copies of recordings for technical reasons related to transmissions. *Id.* The Library of Congress was given the power to recommend distance education programs which could potentially cut-back copyright owners' rights. DMCA § 403, 112 Stat. at 2889. Additionally, a compulsory licensing scheme was created for subscription services and certain non-subscription services, and the Librarian of Congress was given the power to determine a schedule of rates and terms which are binding on copyright owners. 17 U.S.C. § 108 *amended* by DMCA § 405, 112 Stat. at 2890.

These types of limitations are nothing new. The 1976 Act is riddled with exceptions and exemptions. Over half of the sections in Chapter 1 of Title 17 are dedicated to somehow limiting the rights of copyright owners.

The doctrine of fair use is a massive exception to a copyright owner's exclusive bundle of rights. As an example, 17 U.S.C. § 107 allows the free use of copyrighted works for purposes such as criticism, comment, parody, news reporting, teaching, scholarship, and research. Further, § 107 is meant to be illustrative and not meant to limit what may be considered fair use. *See*, PATRY at 722-23. The 1976 Act's codification of fair use is regarded as an expansion of the fair use rights present under the 1909 Copyright Act. *Id.*

Other exemptions which affect songwriters are those for broadcasters relating to ephemeral recordings: § 112; a statutory licensing scheme for digital transmissions: *Id.*; a compulsory license for making and distributing phono records containing musical works: § 115; the public broadcasting exemption: § 118; the "first sale" doctrine: § 109; the ten exceptions to the performance right (includes: face to face instruction, educational broadcasting, religious performances, non-profit performances, the small business exemption, agricultural and horticultural fairs, record stores, for the blind or handicapped, for non-profit veterans and fraternal organizations): § 110 (1-10); a compulsory license for secondary transmissions by cable and other broadcasters: §§ 111, 119; a compulsory license for jukeboxes: § 116; and a five year statute of limitations for criminal proceedings and three years for civil actions: § 507.

II. RETROSPECTIVE COPYRIGHT TERM EXTENSION PROMOTES THE PROGRESS OF SCIENCE.

A. Petitioners' Presumption That Copyright Is Granted To Writers Only For The Purpose Of An Incentive To Create New Works Is Flawed. Promoting The Progress Of Science Is Not Limited To New Creation.

Copyright is "intended definitely to grant valuable, enforceable rights to authors. . . to afford greater encouragement to the production of literary works of lasting benefit to the world." *Cf. Washingtonian Publ'g v. Pearson*, 306 U.S. 30, 36 (1939). "To induce release to the public of the products of his creative genius." *U.S. v. Paramount Pictures*, 334 U.S. 131, 158 (1948). What promotes the progress of the sciences is broad in nature, and at least includes anything that adds to the sum of artistic knowledge.

Petitioners' sole reason for claiming that the CTEA does not promote the progress of the sciences is that the extension cannot act as an incentive for the creation of new works. Pet. at 19-22. Neither the Copyright Clause nor case law provides authority for the proposition. Quite the contrary, promoting the progress of science is to be read broadly. *See*, *McClurg*, 42 U.S. at 206; I NIMMER, supra p. 8, at § 1.03.

There are numerous reasons that the CTEA promotes the progress of science including as stated above: (i) harmonization of the term of protection in the U.S. with that of the EU smoothes the operation of global licensing and business transactions and encourage the use of American songs; (ii) building American intellectual property wealth by avoiding the rule of the shorter term; (iii) providing greater public access to literary works through copyright protection; and (iv) providing a better balance between the rights of copyright owners and users of copyrighted works through an expansion of exceptions and limitations to copyright.

However the CTEA also promotes the progress of the sciences by, among other things: (i) providing authors incentives and rewards to continue the art of songwriting; (ii) providing capital to copyright owners to be reinvested in the creation of new works, and the greater dissemination, preservation and restoration of existing works; (iii) providing greater employment opportunities for authors; (iv) providing mechanisms to ensure quality control of existing works; and (v) providing for funding of foundations, authorship development programs, scholarships, grants, awards and other activities which encourage writing and benefit the public.

B. Congress Knew That The Extension Of Existing Works Would Help To Foster The Creation Of New Musical Works.

As this Court stated in *Harper*:

> Copyright is intended to increase . . . the harvest of knowledge . . . [T]he scheme established by the Copyright Act . . . foster[s] the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.

471 U.S. at 545-546 (citing *Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1975)).

Congress was aware that income earned by copyright owners from another twenty years of copyright protection for existing works allowed copyright owners to reinvest that money into the creative process — to increase the harvest. *Continued Hearings on the Copyright Term Extension Act of 1995: Hearing on H.R. 989 Before the Subcomm. On Courts and Intellectual Property, Comm. on the Judiciary*, 104th CONG. (July 13 1995), (statement of Marybeth Peters, Register of Copyrights) ("It appears reasonable to conclude that a longer revenue stream for copyrighted material is to the public good because funds become available for the creation of new works"). Music publishers routinely sign many songwriters in the hope that some of them will pen the hit songs that will subsidize the business. Congress knew term extension would allow publishers to hire more songwriters who would have the opportunity to write new songs. Publishers would in turn be able to invest money into the exploitation of new unproven works. *Id.* The greatest benefactor of this result is the public.

Petitioners argue that the CTEA will not induce George Gershwin to write any more works for the benefit of the public. Pet. at 22. However, Petitioners are missing the

forest for the trees. The income earned from the continued exploitation of existing works like those of George Gershwin, allows new authors the opportunity to become songwriters, and provides incentives to copyright owners to further disseminate existing works.

The financial rewards of the CTEA directly benefit songwriters. Unlike the film industry, the standard in music publishing is that 50% of the royalties earned from a song are distributed to the songwriters (or the songwriters' heirs) for the full term of copyright. *See*, PASSMAN, supra p. 13. at 215. Additionally, many major songwriters and artist-songwriters retain their publishing rights (i.e. they are their own publisher, retaining ownership of their copyrights and perhaps hiring someone to do the clerical function of administration). *Id. at 218.* Accordingly, any extension of the term of protection directly enhances the return a songwriter or his heirs will receive from the exploitation of his or her life work.

Commissioner Lehman testified: the extra twenty years "would result in greater financial rewards for the authors of the works, which will in turn, encourage these authors to create more new works for the public to enjoy." *Hearing on S. 483, supra* note 8.

C. Congress Determined That Sound Recordings And Films Were More Likely To Be Restored Through Retrospective Term Extension.

Congress made the reasonable determination that retrospective term extension would positively effect the restoration and preservation of American culture. Senator Hatch explained that many works were preserved in perishable media, and could be better preserved and disseminated in digital formats. Congress knew if the substantial investment in digitizing was to be made, private

parties needed an economic incentive and recoupment of their investment. Congress determined that extending copyright for an additional two decades would provide this incentive. *Hearing on S. 483, supra* note 8 (statement of Sen. Hatch); *See also*, (statement of Comm'r Lehman).

D. Congress Determined That The Promise Of Longer Royalty Income Flowing To A Songwriter's Heirs Is An Incentive To Create New Works.

Songwriters must hope that the public's taste finds favor with their works even for a fleeting moment. Many songwriters are living below the poverty level, with no retirement savings and have nothing to leave to their children. 144 CONG. REC. S12434, (daily ed. Oct. 12, 1998) (statement of Sen. Thompson). The average songwriter earns only $5,000 in royalties per year. *Id.* There is no 401k program for songwriters. Accordingly, the promise of long term royalty participation for their legacy is an enormous incentive to continue on in the endeavor of songwriting.[12]

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[12] Opponents of term extension have often relied on a speech by MaCaulay (delivered in the House of Commons (Feb. 5, 1841)) to argue that leaving a legacy to one's heirs is not an incentive to authors. *See generally*, THOMAS MACAULAY, SPEECHES ON COPYRIGHT (C. Gaston ed. 1914). This argument falls flat. MaCaulay made this argument with the belief that copyright was purely personal property and would always end up in the hands of publishers. It was his belief that authors would never realistically share in any future income, so authors would never perceive a legacy as an incentive. However, Congress has made sure that authors' heirs can terminate transfers made to publishers, and because royalties are paid on splits between authors and publishers, heirs are guaranteed to see income. Thus, MaCaulay's basic presumption has crumbled.

Congress acted upon evidence that creators want to pass on the income derived from the exploitation of their works to their children and grandchildren. Congress reasonably determined that extending the term of protection for existing works would give writers greater incentive to write new works.

Songwriter Alan Menken's testimony highlighted the fact that "the continuing ability to provide for one's family, both during and after one's lifetime, would certainly be a factor [in choosing a career]." *Hearing on S. 483*, *supra* note 8. If it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try to make one's living as a creator. *Id.* It was reasonable for Congress to infer that an extra twenty years might allow those who create to continue doing so, with greater confidence that their families will be taken care of.

Bob Dylan, whose first song was published in 1961, also testified that it was his impression that his songs would remain in his family and that they would one day be the property of his children and grandchildren. *Hearing on S. 483*, *supra* note 8. Carlos Santana reiterated Dylan's understanding. *Id.*

Congress heard another reason for the need to modify the incentives that sustain the craft of songwriting: people now live longer. Songwriters testified that under the prior term of protection, the right to earn income from their works would pass into the public domain before their children were out of their thirties, or worse yet, during their own lifetimes. "My catalogue will begin to fall into public domain when my youngest child is 30 years old. I have no desire to see my children be denied that which I intended for them." *Id.* (statement of Quincy Jones). "American works created before January 1, 1978. . . are only afforded copyright protection for

a total of 75 years from creation... In several instances, works, such as Irving Berlin's "Alexander's Ragtime Band," have fallen into the public domain while the author is still living." *Id.* (statement of Alen Menken).

Perhaps the best example of the need for extended protection in order to provide for one's family came from the genre of classical music. Congress heard that for serious music, even 70 years after death is sometimes insufficient. For example, J.S. Bach's music had to wait almost 100 years after the composer's death before it was discovered. Randol Schoenberg explained that had his grandfather not had faith in the ability of his copyrights to support his family, he would not have been able to devote the time that his groundbreaking work required. *Id.* (statement of E. Randol Shoenberg, grandson of Arnold Schoenberg). Congress determined that the prior term of protection was not sufficient.

E. The Continued Royalty Flow Which Has Occurred For Existing Works Due To The CTEA Directly Funds Non Profit Foundations, Authorship Development Programs, Scholarships, Grants, Awards, And Other Activities Which Encourage Writing And Benefit The Public.

In the songwriting community alone, there are numerous examples where monies earned from existing copyrights are being poured back into the development of new authorship. For example, the American Society of Authors and Composers (ASCAP) Foundation is "dedicated to nurturing the musical talent of tomorrow, . . . and sustaining the creative incentive for today's creators through a variety of educational, professional, and humanitarian programs and activities which benefit the entire music community." ASCAP Foundation Mission statement. ASCAP, a performing rights

society, collects various royalties worldwide earned from the use of existing copyrighted musical compositions. Its members, board of directors and officers are made up exclusively of musical authors, composers and publishers, who provide the services of their employees to administer the ASCAP Foundation. Additionally, many ASCAP members use the money earned from the payment of royalties from their existing works to fund the Foundation and its many programs. A substantial list of these scholarships, awards, grants and other program can be found in the Appendix. Among many others, existing works which provide revenue to support these programs include: "Hound Dog," "Jailhouse Rock," "Stand By Me," "On Broadway," "Mona Lisa," "Que Sera Sera," "Take Me Out to the Ballgame," "Hello Dolly," and works from the musicals "Oklahoma," "The King and I," "The Sound of Music," "Porgy and Bess," "They all Laughed," "My Fair Lady," and "Camelot."

The other major American performing rights society Broadcast Music Incorporated (BMI), administers the BMI Foundation for the encouragement of young composers. The BMI Foundation is dedicated to encouraging the creation, performance and study of music through awards, scholarships, commissions and grants. BMI Mission statement. Many of the songwriters affiliated with BMI use the money they earn from copyright royalties to fund the BMI Foundation and its many programs. Some of these are also listed in the Appendix.

Without the royalty income earned from existing copyrighted works, these incentives to young composers and authors could not be sustained and the public would lose access to many great new works, the creation of which simply could not be financially possible. Nowhere is this more apparent that in the genre of classical music. Without commissions and scholarships this treasure of American

culture could be lost forever. Copyright allows the genre to survive so that younger generations will have continued access to these great works, and hopefully the genre will reemerge due to their interest.

F. Petitioners Have Other Alternatives To Achieve Their Desired Goal — The Free Use Of Copyrighted Works. Petitioners Are Attempting To Use An Axe Where They Should Be Using A Scalpel.

The exceptions and limitations to copyright discussed above make it abundantly clear that those who wish to use copyrighted works freely have options at their disposal other than the broad taking of twenty years of copyright protection. Numerous special interests, from veterans organizations, 17 U.S.C. §110(10), to Internet Service Providers, DMCA § 202 (Limit on ISP liability), have successfully lobbied Congress for their own custom tailored exemptions. In addition to legislation, Congress has brokered agreements between copyright owners and certain special interest groups. *See*, H.R. REP. NO. 101-1015 at 77 (1991) (Subcommittee Chairman Robert W. Kastenmeier encouraged copyright owners and representatives of nursing homes to resolve their differences. On August 3, 1990, in a ceremony in the full House Judiciary Committee room, an agreement was formalized.). Petitioners can also request gratis licenses, which are frequently granted by copyright owners.

This Court has encouraged copyright users to seek non-judicial means to gain access to copyrighted works. *See*, *N.Y. Times v. Tasini*, 533 U.S. 483, 505 (2001). Many of the Amici, writing on behalf of Petitioners, lobbied against the term extension. *See*, *Hearing on S. 483*, *supra* note 8. (statement of Peter Jaszi); *Hearing on S. 989*, supra p. 22 (statement of Dennis Karjala,) Congress listened to their concerns and rejected their position.

The self-interests of a handful of public domain publishers should not dictate the copyright policy of the U.S. The policy Petitioners seek offers inferior protection to authors and publishers. If Petitioners feel otherwise, they are free to lobby Congress to make the changes they feel necessary.

CONCLUSION

NSAI cannot stress enough how important the CTEA is to the health of the songwriting community. If this Court overturns the CTEA, it will cause grave repercussions to American authors and to the bounty of America's creative harvest. For all of the reasons expressed above, Congress had the power to extend retrospectively the term of protection for existing works and the CTEA does not violate the Constitution.

Respectfully submitted,

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APPENDIX

1. The Louis Armstrong Award, funded by the Louis Armstrong Educational Foundation. This award gives two scholarships to junior year students at Mt. Vernon High School based on abilities in music performance and composition.

2. The Leiber and Stoller Music Scholarships, funded by Jerry Leiber and Mike Stoller, writers of such hits as "Hound Dog," "Kansas City," "Jailhouse Rock," "Stand By Me," and "On Broadway." This scholarship is awarded each year to a freshman at Berklee College of Music in Boston and to a recipient at the Young Musicians Foundation in Los Angeles.

3. The Ira Gershwin Scholarship, funded by the late author's heirs. This scholarship is awarded each year to a junior year student at Fiorello H. LaGuardia High School of Music and Art.

4. The Michael Masser Scholarship, funded by Mr. Masser who co-wrote Whitney Houston's hit songs "The Greatest Love of All," "Didn't We Almost Have It All," and "Saving All My Love For You." This scholarship is awarded each year to a student at Fiorello H. LaGuardia High School of Music and Art.

5. The Boosey & Hawkes Young Composer Award, funded jointly by ASCAP and Aaron Copland's publisher. This Scholarship is awarded each year to a graduating senior at Fiorello H. LaGuardia High School of Music and Art.

6. The Livingston & Evans Music Scholarship, funded by Jay Livingston and Ray Evans, writers of "Mona Lisa" and "Que Sera, Sera." This scholarship supports aspiring songwriters and musicians at The Young Musicians Foundation in Los Angeles.

7. The Louis Armstrong Jazz Scholarships, funded by the Louis Armstrong Educational Foundation. These two scholarships are awarded each year to undergraduate students of jazz composition at UCLA.

8. The Louis Dreyfus/ Warner-Chappell City College Scholarship. This scholarship honors George and Ira Gershwin, and is named for their publisher, and is presented each year to a composition student for a score written for dance, film/video or theatre at City College/City University of New York.

9. The Louis Armstrong Scholarship, funded by Louis Armstrong Educational Foundation. This scholarship is presented each year to a jazz composition student at the Aaron Copland School of Music at Queens College/City University of New York.

10. The Frederick Loewe Scholarship, funded by the Frederick Loewe Foundation. Mr. Loewe composed the music for "My Fair Lady," "Camelot," "Brigadoon," and "Gigi." Presented each year to a student of musical theatre composition at the Tisch School of Arts at New York University.

11. The Max Dreyfus Scholarship, funded by the Max and Victoria Dreyfus Foundation. This scholarship was created to encourage the study of musical theatre and is presented each year to a student at the Tisch School of Arts at New York University.

12. The Raymond Hubbell Music Scholarship, funded by a trust created by Estelle Hubbell widow of the late composer. This scholarship is given to a select number of composition students at accredited colleges, conservatories and universities around the country.

13. The Henry Mancini Composer Scholarship. This ASCAP Foundation program provides the funds to support two full scholarships for composer positions at the Henry Mancini Institute.

14. The ASCAP Foundation Young Jazz Composer Awards, supported by the Joseph and Rosalie Meyer Fund. These awards are granted annually to encourage talented young jazz composers.

15. The Morton Gould Young Composer Awards, initially funded by the Jack and Amy Northworth Memorial Fund (Jack wrote such standards as "Shine On Harvest Moon" and "Take Me Out To the Ballgame"). These awards are granted each year to several young composers to encourage development of musical talent in all genres.

16. The Sammy Cahn Award, funded by Tita Cahn. This cash award is given each year to a promising lyricist.

17. The Richard Rogers New Horizons Award established by the daughter of the great composer of such classics as "Pal Joey," "Oklahoma," "Carousel," "The King and I" and "The Sound of Music" and funded by the Rogers Family Foundation. This is an annual award to young composers.

18. The ASCAP Foundation Songwriter Workshop Series. ASCAP sponsors workshops that help develop young songwriters in cities throughout America.

19. The Kennedy Center Musical Theatre Initiative. Funded by ASCAP, the Kennedy Center and Walt Disney Feature Animation to nurture the development of new musicals.

20. The ASCAP Foundation Demo2deal Program. This program gives songwriters the opportunity to record at a state-of-the-art facility and have their music heard by major recording companies.

21. The ASCAP Foundation Commission Program. This program supports commissions awarded to emerging concert composers.

22. The ASCAP Foundation Composer-in-Residence Programs. These programs bring classroom teachers and their students together with professional songwriters and publishers to encourage students to write.

23. The Fellowship for Film Scoring and Composition at Aspen. This ASCAP program enables students to study film composition and film scoring at the Aspen Music Festival and School.

24. The John Denver Camp Scholarship Program; funded by Rosalie Meyer, widow of Joseph Meyer who wrote "If You Knew Susie," and "California Here I Come" and John Denver's publisher. Three students are offered scholarships to the Perry Mansfield Performing Arts School in Colorado.

25. The Henry Mancini Scholarship program, funded by Ginny Mancini, widow of Henry who wrote "Days of Wine and Roses" and "Breakfast at Tiffany's." This scholarship program allows three music composition students to attend the Henry Mancini Institute during the summer.

26. The Jerry Herman Legacy Series, funded by Mr. Herman who wrote "Hello Dolly," "Mame," and "La Cage aux Folles." This ASCAP program brings musical theatre to student across the country with seminars, which include the craft of writing and master classes in musical performance and with focus on composer/lyricist contributions.

27. The Manhattan School of Music Summer Camp. The camp provides tuition free, intensive, high quality music instruction to talented students in grades 5-8 who are enrolled in the New York City Public School System and have little access to musical training.

28. Music in the Schools. ASCAP and VH-1 support music education by providing musical instruments, folios, sheet music, band arrangements and method books to public schools nationwide.

29. The John Lennon Scholarship Fund, funded by Yoko Ono. This scholarship fund offers cash awards to young writers of original songs.

30. The Carlos Surinach Fund. This fund is dedicated to the encouragement and support of young composers of classical music.

31. The Pete Carpenter Film Composing Internship. This internship gives aspiring young film and TV composers a financial subsidy and the opportunity of a personalized tutorial program in Los Angeles working with established film composers.

32. The Lionel Newman Conducting Internship. This internship gives young conductors the opportunity to work for a three-year period with the Los Angeles Young Musicians Foundation Debut Orchestra. Includes the opportunity to work with well-known conductors and to conduct works independently.

33. The Jerry Bock Musical Theatre Award. This award offers financial assistance to graduates of the BMI Lehman Engel Musical Theatre Workshop to aid in the development of a project.

34. The Boudleaux Bryant Fund. This fund commissions a chamber music work by a young composer.

35. The Jean Pratt Memorial Fund. This fund provides an award for musical achievement to a student of Coffeyville Community College.

36. The Milton Adolphus Prize. This prize is awarded to a student at LaGuardia High School for the Performing Arts for proficiency in the field of jazz.

No. 01-618

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

—v.—

JOHN D. ASHCROFT,
in his official capacity as Attorney General,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE SONGWRITERS GUILD OF AMERICA CONCERNING FIRST AMENDMENT ISSUES AND IN SUPPORT OF RESPONDENT

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August 5, 2002

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of The Songwriters Guild of America ("the Guild"), the largest, oldest, and one of the most prominent American organizations representing the creators of one of our nation's greatest resources—its music.[1] Founded in 1931, the Guild is an unincorporated voluntary association of approximately 5,000 songwriters, which includes the estates of more than 600 deceased songwriters throughout the country. The Guild is run exclusively by and for songwriters and has been helping songwriters further their professional interests for over seventy years. Among other things, the Guild has helped its members draft and review contracts, collect royalties, audit music publishers, and renew copyrights. Its members have included creators of words and music that have resonated throughout our history.

The Guild's membership list reads like a *Who's Who* of music, and has included such renowned composers and lyricists as Burt Bacharach, Samuel Barber, Otis Blackwell, Sammy Cahn, Johnny Cash, Ray Charles, Nat "King" Cole, Bob Dylan, Duke Ellington, Dorothy Fields, Randy Goodrum, Marvin Hamlisch, Oscar Hammerstein II, Sheldon Harnick, Waylon Jennings, Quincy Jones, Burton Lane, Michel Legrand, Henry Mancini, Melissa Manchester, Barry Manilow, Johnny Mercer, Cole Porter, Richard Rogers, Elie Seigmeister, Stephen Sondheim, Barbara Streisand, Billy Taylor, and George David Weiss. The Guild's members' musical repertoires read like a list

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[1] No counsel for any party to this case authored this brief in whole or in part. The American Society of Composers, Authors and Publishers ("ASCAP"), the National Music Publishers Association ("NMPA"), and Broadcast Music, Inc. ("BMI") have each contributed money for the preparation and submission of this brief. In addition, the parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk of Court.

of American music classics—from Broadway hits to classic rock to jazz and rhythm and blues. The list includes Rogers and Hammerstein's "Oh What a Beautiful Morning"; George David Weiss' "The Lion Sleeps Tonight"; Marvin Hamlisch's "The Way We Were"; Stephen Sondheim's "Send In the Clowns"; Johnny Mercer and Henry Mancini's "Moon River"; Sheldon Harnick and Jerry Bock's "Sunrise Sunset"; Jerry Leiber and Mike Stoller's "Jail House Rock"; Cole Porter's "Night and Day"; Ervin Drake's "It Was a Very Good Year"; Gus Kahn's "It Had to Be You"; Richard Adler's "You Gotta Have Heart"; Barry Manilow's "Daybreak"; Ray Charles' "Hit the Road Jack"; Bob Dylan's "Blowin' In the Wind"; and innumerable more.

For more than a century, the world has been listening to distinctly American music. Ragtime, Jazz, Big Band, Pop, Rock, R & B, Soul, Metal, and Grunge have all been adopted and imitated around the world, and all are American sounds. Just as America has a unique place in contemporary music, music has a unique place in the American experience. Americans wake to the sound of their clock-radio, drive to work listening to their favorite FM station, then use their (or their employers') computers as CD players. We wake, work, live and love to the sound of music.

Music is not only a highly personal expressive choice, it is also a medium for the American discourse in the core speech areas of politics and religion. The depression-era social protest songs of Woody Guthrie and Pete Seeger grew out of Hillbilly, the first musical style broadcast to a national audience via radio in the 1920s. *See A National Culture?, available at* http://xroads.virginia.edu/~1930s/RADIO/c_w/essay3.html. Songs like *This Land is My Land* express social criticism at the same time they embrace love of country, and broadcast their entreaties to a mass audience.

Since that time, popular music and political music have been closely related. By the 1930s and '40s, Jazz was both the popular music of nightclubs and dancehalls, and a vehicle for political critique. An early example is Lewis Allen and Billy Holliday's 1938 *Strange Fruit*:

> "Southern trees bear strange fruit
> Blood on the leaves and blood at the root
> Black bodies swinging in the southern breeze
> Strange fruit hanging from the poplar trees."

By the end of the 1960s, music was a primary medium for political communication by and to young people, through anthems such as Crosby, Stills & Nash's *Ohio*, written about the May 4, 1970 killings of four student protesters at Kent State University and Creedence Clearwater's *Fortunate Son*, written about the fact that the children of the powerful will likely never have to fight in a war. *See* John Fogerty, Rolling Stone Interview, *available at* http://www.cc.jyu.fi/~petkasi/ccr-jcf/trivia.htm. Music even ventured into journalism. In 1976, Bob Dylan had a number one hit with *Hurricane*, about a convicted murderer later exculpated.

Contemporary popular music is often political speech set to a beat; the stories told are political stories. 10,000 Maniacs' *Please Forgive Us*, written at the time of the Iran-Contra scandal, contained this message: "When they're so apt to wrap themselves up in the stripes and stars and find that they are able to call themselves heroes and to justify murder by their fighters for freedom. . . . Please forgive us; we didn't know." *See* Harold DeMuir, *Zoo Hours: Natalie Merchant and 10,000 Maniacs Enter a Dark Period*, BAM, Aug. 11, 1989, *available at* http://gdrmusic.com/atnatalie/library/bmz/890811b.htm.

As Americans are often both religious and musical, our religious practices incorporate music too. Many cul-

tures use music in religious ceremonies, but in the genres of Revival, Gospel and Soul, music is both a media for the communication of religious ideas and an act of religious devotion. *See* Roger Hall, *Religion in Song: The Craftsmanship of Shaker Music*, Shaker J., June 1999, *available at* http://home.att.net/~shakercrafts/docs/hall.html; Ken Curtis *et al.*, *Charles Wesley: Heart of the Evangelical Revival*, 29 Glimpses, *available at* http://www.gospelcom.net/chi/GLIMPSEF/Glimpses/glmps029.shtml. Music is as much a symbol of American freedom as our religious tolerance. When Americans Jews smuggled religious texts into the Soviet Union for *refuseniks*, they also brought blue jeans and Rock 'n Roll albums with them.

Music is used both as an element of our national rituals, and an emblem for entire periods in our history. Just as no baseball game may begin without *The Star Spangled Banner*, no American can hear *We Shall Overcome* without recalling the moment when America looked at itself, was unhappy with what it saw, and changed for the better. In songs such as *God Bless America*—rediscovered and revived to rally the nation in the aftermath of September 11th—and in other songs throughout our history, *The Battle Hymn of the Republic* and *Let's Remember Pearl Harbor* to name only two, we are stirred and inspired.

As writers of songs, the members of the Guild care deeply about both the protections and benefits afforded under the Copyright Act and the First Amendment. The Guild's members have always had a strong interest in —and have vigorously advocated for—both a strong First Amendment and hardy copyright protection for its members. As songwriters, the Guild's members have been historically among those who exercise their First Amendment rights to provide social commentary and stimulate open, robust debate about issues of social

importance. At the same time, the Guild's members—and their families—rely on the copyright protections provided to them by Congress, often using the royalties from their work to provide for their families and/or to fund their future creative endeavors.

The Copyright Term Extension Act ("CTEA") serves to protect the works of many of the Guild's songwriters, many of whose works would have fallen into the public domain in or shortly after 1998 were it not for the CTEA. Among those many works at risk of entering the public domain if the CTEA is struck down are "Baby Face" by Harry Akst and Benny Davis; "Indian Love Call" by Otto Harbach, Rudolph Friml, and Oscar Hammerstein II; "Dinah" by Harry Akst, Joe Young, and Sam H. Lewis; "June Night" by Abel Baer and Cliff Friend; "I Love My Baby (My Baby Loves Me)" by Harry Warren and Bud Green; "You're the Cream in My Coffee" by B.G. DeSylva, Lew Brown, and Ray Henderson; "Who's Sorry Now?" by Ted Snyder, Harry Ruby, and Bert Kalmar; "Swinging Down the Lane" by Isham Jones and Gus Kahn; "Minnie the Mermaid" by B.G. DeSylva; "Manhattan" by Lorenz Hart and Richard Rodgers; "Yes Sir! That's My Baby" by Walter Donaldson and Gus Kahn; "Let's Do It (Let's Fall in Love)" by Cole Porter; "Stardust" by Hoagy Carmichael and Mitchell Parish; and "Yes! We Have No Bananas" by Irving Cohen and Frank Silver.

The Guild is deeply interested in ensuring that copyright protections afforded to its members under the CTEA are upheld so as to encourage artists—including the Guild's members—to continue producing creative works. As a party uniquely interested in both a strong and protective First Amendment and a strong and protective copyright law, the Guild submits this brief *amicus curaie* to address the First Amendment challenge to

the CTEA in this case. The Guild urges the Court to uphold the constitutionality of the CTEA.

SUMMARY OF ARGUMENT

Copyright law, virtually by definition, affects speech. It is meant—its very purpose is—to encourage the creation of speech by providing, in the language of the Constitution, "for limited Times to Authors . . . exclusive Right to their . . . Writings . . . ." U.S. Const. art. I, § 8, cl. 8.

In establishing the Copyright Clause, the Framers conclusively determined what petitioners and their *amici* allies would have this Court subject to continuing reconsideration: that copyright protection does indeed "promote the Progress of . . . useful Arts." In this case, petitioners challenge the particular time period that Congress determined copyright protection should be afforded—20 more years in the CTEA than in the statute previously in effect. According to petitioners, that time period is excessive since it will not sufficiently "promote" the "progress" of "useful arts" to outweigh the harm to free expression it will supposedly inflict.

But this is far from the approach taken in the Constitution itself or in the caselaw of this Court. This Court has repeatedly made plain that any congressional determination as to the length of time of copyright protection should be treated with a particularly high level of deference. In cases as antique as *Pennock* v. *Dialogue*, 27 U.S. 1, 17 (1829), the Court said in so many words that the period of time for which copyright protection could be given was "subject to the discretion of congress." In later cases, this and other courts have made plain that it is not the role of the judiciary "to alter the delicate balance Congress has labored to achieve" when it determines what "limited period" of copyright protection should be

granted. *Stewart* v. *Abend*, 495 U.S. 207, 230 (1990). On the basis of cases of this sort alone (there are none to the contrary), the Guild submits that this Court should defer to Congress's determination.

Application of rational basis scrutiny could accomplish this since even petitioners make no claim that the CTEA would fall under such review. The thrust of this brief *amicus curiae*, however, is that the Court should take the approach it has consistently taken in this and related areas of focusing on the special characteristics of the law with which First Amendment interests are said to conflict in determining how to weigh the competing interests at issue.

We do not suggest that copyright law is or ever has been "exempt" or "immune" from First Amendment review. A copyright law that invariably prohibited the use at all of copyright language would likely be unconstitutional; so would a law that sought not only to protect expression but the facts and ideas communicated by that expression. This Court has repeatedly observed that the First Amendment requires copyright law to contain certain built-in First Amendment-like protections such as the fair use doctrine and the idea/expression dichotomy, concepts that provide the necessary breathing space required by First Amendment precepts while still permitting the copyright law to achieve its intended end of promoting the arts.

This brief argues that however the Court articulates the standard it is applying, the intermediate scrutiny standard articulated by this Court in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994), filled as it is with the imposition of heavy burdens on the government, is wholly inconsistent with the deference due a congressional determination of the amount of years a copyright should persist. We approach this in a variety

of ways. In addition to the rulings of this Court dictating that a high degree of deference should be granted to congressional decisions as to the amount of years of copyright protection, other rulings governing defamation and right of publicity claims both suggest that laws of this sort that undoubtedly affect and, to some extent, limit speech should be addressed not simply by categorizing the scope of review as "rational," "intermediate" or "strict" but by focusing on the nature of the area of law at issue and then assuring that First Amendment interests are accommodated—if they can be—within the framework of that body of law. In the areas of defamation and right of publicity law, that is precisely what this and other courts have done. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964); *Comedy III Productions, Inc.* v. *Gary Saderup, Inc.*, 21 P.3d 791, 810 (Cal. 2001), *cert. denied*, 122 S. Ct. 806 (2002).

Copyright is a particularly apt area for such an approach since its function is to serve as an "engine of free expression." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). It does this by promoting creativity through a delicate balanced system that protects the expression of those that create it by limiting for "limited times" that of those who would copy it.

The type of intermediate scrutiny proposed by petitioners and their *amici* supporters would call into question the validity of all copyright law. If intermediate scrutiny were to apply, then the type of economic incentive analysis done by the Economists' *amicus* brief submitted in support of petitioners[2] could easily be used to subject the duration—and, indeed, even the existence of—any copyright law to far more exacting scrutiny than

[2] *See* Brief of George A. Akerlof, *et al.* as *Amici Curiae* in Support of Petitioners (hereinafter "the Economists' *Amici* Brief").

either this Court or the Founders ever intended. This Court, under such an approach, could be required to perform an economic analysis to test the Framers' own determination that copyright law does indeed "promote" the arts. That outcome is inconsistent with both the Framers' intentions and this Court's rulings.

ARGUMENT

I. BOTH THE COPYRIGHT CLAUSE AND THIS COURT'S PRECEDENT REQUIRE A DEFERENTIAL STANDARD OF REVIEW OF LAWS GOVERNING THE DURATION OF COPYRIGHT

Congress' determination as to the duration of copyright has never been subjected to the type of intermediate scrutiny proposed by petitioners and their *amici*. The existence of the Copyright Clause itself, U.S. Const. art. I, § 8, cl. 8, evidences the Framers' conclusion that copyright's limited monopolies were not only consistent with free speech principles, but actively promoted them. *See Harper & Row*, 471 U.S. at 558 ("[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression.").

In this vein, both this Court and numerous courts of appeals have concluded that a court's review of the Congress' decision on the duration of copyright must be highly deferential. As long ago as *Pennock v. Dialogue*, 27 U.S. 1 (1829), this Court concluded that the Copyright Clause of the Constitution contemplates that the monopolies provided by copyright law "shall exist but for a limited period, and *that the period shall be subject to the discretion of congress*." *Id.* at 16-17 (emphasis added). In *Stewart v. Abend*, the Court explicitly stated that judicial review of Congress' choice about the duration of the copyright term should be deferential. Noting that, over the years, Congress had devised a number of

different copyright schemes governing the duration of the copyright term, the Court concluded that:

> "This evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to 'secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings." U.S. Const., Art. I, § 8, cl. 8. . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve."

Stewart, 495 U.S. at 230. Numerous courts of appeals have agreed. In *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980), for example, the Fifth Circuit, in finding that a copyright subsists even in a work that is obscene, noted the limited nature of judicial review of copyright laws generally:

> "Congress has authority to make any law that is 'necessary and proper' for the execution of its enumerated Article I powers, . . . including its copyright power, and the court's role in judging whether Congress has exceeded its Article I powers is limited."

Id. at 860.[3] *Accord Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982).

Judicial review of copyright laws must thus be carefully limited—far more so than the application of any

[3] The correct ruling in *Mitchell Bros.* might, after this Court's ruling in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), have been phrased differently since it now appears under *R.A.V.* that a copyright law that determined which works are copyrightable based on their subject matter might for that reason alone violate the First Amendment. *Id.* at 388. That would certainly be the case if (as one example in *R.A.V.* suggests) copyright protection were unavailable for obscene works "which include[ ] offensive political messages." *Id.* In such circumstances, copyright law would be subjected to First Amendment scrutiny of a sort not called for in this case.

heightened scrutiny test would permit. One way to accomplish this would simply be to apply rational basis scrutiny to this case. But as we set forth below, we believe it is more consistent with the Court's prior determinations in this area to adjudicate First Amendment challenges to copyright law by taking into account the First Amendment function served by that law itself and by assuring that certain First Amendment-accommodating substantive provisions are contained within it. This approach has been applied successfully by this Court and others in the copyright arena, and in other areas of First Amendment law, including both defamation and right of publicity law. There is no need to abandon it now.

II. THE CTEA DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE COPYRIGHT LAW CONTAINS SUFFICIENT FREE SPEECH PROTECTIONS TO SATISFY THE FIRST AMENDMENT

It has long been noted by courts and legal scholars alike—at least since Professor Melville Nimmer's seminal law review article on the subject—that there is an apparent tension or paradox between copyright law and the First Amendment. *See generally* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. Rev. 1180, 1180-86 (1970). But courts have almost universally noted that that tension can be resolved by the enforcement of certain other doctrines of copyright law, such as the idea/expression dichotomy and the fair use doctrine, that not only help accommodate important First Amendment interests, but to assure that copyright serves as an "engine of free expression." *See Harper & Row*, 471 U.S. at 558. As both this Court and others have noted, courts have generally rejected First Amendment

challenges to copyright laws because the substantive provisions of and doctrines embodied in copyright law themselves resolve the apparent tension between copyright and the First Amendment in a manner that adequately protects First Amendment interests. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577-78 n.13 (1977) ("We note that Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that 'no restraint [has been] placed on the use of an idea or concept.' ") (citation omitted); *Eldred v. Reno*, 239 F.3d 372, 376 (D.C. Cir. 2001) ("Although there is some tension between the Constitution's copyright clause and the first amendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression.") (quoting *United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989)). *See also* Floyd Abrams, *First Amendment and Copyright*, 35 J. Copyright Soc'y 1, 3-4 (1987). The familiar categories of strict, intermediate, and rationally-related review have thus generally not been applied to First Amendment challenges to copyright; rather, courts have applied First Amendment scrutiny by assuring that copyright law, which itself exists to promote freedom of expression, contains provisions that adequately protect First Amendment interests.

Petitioners and their *amici* urge this Court to overturn this settled body of law and subject all copyright laws to the intermediate scrutiny test set forth by this Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994). In arguing for this radical change, petitioners and their *amici* seize upon the court of appeals' statement in its opinion below in this case that "copyrights are categorically immune from challenges under the First Amendment." *Eldred*, 239 F.3d at 375. In so

doing, petitioners and their allied *amici* misconstrue the main thrust of the decision below and set up a straw man to argue against. For while the statement of the court of appeals, standing in isolation, might be subject to challenge if First Amendment principles were not required to be taken account of in copyright law itself, those principles are already—and, indeed, must be—accommodated by copyright law. There is no basis for maintaining that still additional First Amendment tests must be applied.

A. This Court and Others Have Repeatedly Held that Copyright Law Contains Sufficient Substantive Protections of Free Speech Interests to Satisfy the First Amendment

Copyright law has long been subjected to First Amendment scrutiny that requires certain substantive protections of free speech interests within the regime of copyright itself. Thus, courts—including this one—have generally found copyright laws to satisfy First Amendment scrutiny because doctrines such as the idea/expression dichotomy and the fair use doctrine adequately accommodate free expression interests.

1. The Idea/Expression Dichotomy Adequately Safeguards Freedom of Speech Interests

It is one of the most fundamental principles of copyright law that copyright cannot protect an author's ideas, but rather protects only the expression of those ideas. *See Baker v. Selden*, 101 U.S. 99, 105-07 (1879); codified at 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."); *see also* Nimmer, 17 U.C.L.A.

L. Rev. at 1189. As this Court has observed on several occasions, it is partly through this idea/expression dichotomy that copyright embodies the First Amendment's underlying principles of encouraging the free exchange of ideas and stimulating robust and open debate. *See, e.g., Harper & Row*, 471 U.S. at 556 (noting that "copyright's idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression' ") (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 203 (2d Cir. 1983)); *New York Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring) (copyright laws do not infringe on freedom of speech because copyright protects only the form of expression and not the idea itself). Leading commentators have likewise observed that copyright serves to fuel First Amendment interests—even though it limits some forms of speech—largely because of this idea/expression distinction. As Professor Nimmer put it:

> "In general, the democratic dialogue—a self-governing people's participation in the marketplace of ideas—is adequately served if the public has access to an author's ideas, and such loss to the dialogue as results from inaccessibility to an author's 'expression' is counterbalanced by the greater public interest in the copyright system."

1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.10[C][2] (2002). It is exposure to ideas—and not to one particular form of expression—that predominantly promotes First Amendment values. *Id.*

Courts have taken into account copyright's accommodation of First Amendment principles through the idea/expression dichotomy when subjecting federal

copyright laws to First Amendment scrutiny. As this Court has made plain, First Amendment challenges to copyright laws have generally been rejected precisely because the copyright laws' idea/expression dichotomy adequately protects First Amendment interests. *See Zacchini*, 433 U.S. at 577 n.13 (noting that lower courts have rejected First Amendment challenges to federal copyright laws because copyright law puts no restraints on the use of an idea or concept). *See also United Video, Inc. v. FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989) ("Although there is some tension between the Constitution's copyright clause and the first amendment, the familiar idea/expression dichotomy of copyright law, under which ideas are free but their particular expression can be copyrighted, has always been held to give adequate protection to free expression."); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263-64 (11th Cir. 2001) ("In copyright law, the balance between the First Amendment and copyright is preserved, in part, by the idea/expression dichotomy. . . ."); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1115 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001) ("The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts.").

2. The Fair Use Doctrine Adequately Safeguards Freedom of Speech Interests

The doctrine of fair use also provides built-in First Amendment protections in copyright law. Under that doctrine, "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107 (2000). The exceptions to copyright carved out under the fair use doctrine go to the heart of the First Amendment, as they

allow speakers to use not only the ideas of other authors but also their copyrighted expression in order to introduce new ideas or concepts to the public or to further certain fundamental First Amendment interests, such as news reporting, criticism, parody, and education.

In determining whether a particular use of a work constitutes a fair use, the factors to be considered include "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2000). These factors are meant to be illustrative, rather than exhaustive, and "[a]ll [of the four factors] are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994). One of the central purposes courts have considered in performing the fair use analysis is also a central purpose of the First Amendment—namely, ensuring "the free flow of ideas—particularly criticism and commentary." *Suntrust Bank*, 268 F.3d at 1268.

Hence, in *Campbell*, this Court upheld on fair use grounds a parody of the Roy Orbison song "Pretty Woman" that was performed by a rap group without permission of the copyright owner. The Court held that parody, although not specifically listed in § 107, is a form of "comment and criticism" that may constitute a fair use of the copyrighted work being parodied. *Campbell*, 510 U.S. at 579. The Court's accommodation of First Amendment values in its fair use analysis was straightforward. In analyzing the "purpose and character of the use," the Court acknowledged that the "Pretty Woman" parody was published for profit—a factor weighing

against a finding of fair use—but held that this fact was overshadowed and outweighed by the highly transformative use of the song. "[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.* "[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works." *Id.* The relevant inquiry here is whether or not the new work adds something new to the old one, "altering the first with new expression, meaning, or message." *Id.* While "transformative use is not absolutely necessary for a finding of fair use," this Court noted in *Campbell* that "the more transformative the new work, the less will be the significance of other factors. . . ." *Id.* at 580-81.

In *Suntrust Bank*, the Court of Appeals for the Eleventh Circuit similarly stressed the importance of the transformative nature of a parody of the classic book *Gone With the Wind* in finding at the preliminary injunction stage that the parody was likely to survive a copyright challenge on the basis of a fair use defense. *Suntrust Bank*, 268 F.3d at 1269-71. The court of appeals there found that the parody was a highly transformative use, and that finding informed the court's analysis of all the fair use factors. *Id.* at 1271.

Consistent with and underlying the decisions discussed above, this Court has emphasized that the fair use doctrine itself provides copyright law with built-in First Amendment protections. In *Harper & Row*, this Court held that The Nation's advance publication of excerpts from the copyrighted memoirs of former President Gerald Ford infringed Time, Inc.'s copyright in those memoirs. *Harper & Row*, 471 U.S. at 569. In doing so, the Court observed that the doctrine of fair use—like that of the idea/expression dichotomy—provided significant "First Amendment protections" that were "embodied in

the Copyright Act[ ]" itself. *Harper & Row*, 471 U.S. at 560. In light of these First Amendment protections, the Court declined to expand the concept of fair use to create what the Court described as a "public figure exception to copyright." *Id.*

Not surprisingly, courts of appeals (including the court of appeals in this case) have repeatedly concluded that the First Amendment protection embedded in the fair use doctrine—like that in the idea/expression dichotomy—suffices fully to protect First Amendment interests. *See, e.g., Eldred,* 239 F.3d at 376 (works subject to "the latter half of the 'idea/expression dichotomy' " and "subject to fair use" do not require further inquiry under the First Amendment); *Suntrust Bank*, 268 F.3d at 1264-65 ("Because of the First Amendment principles built into copyright law through the idea/expression dichotomy and the doctrine of fair use, courts often need not entertain related First Amendment arguments in a copyright case."); *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) ("We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine."); *Los Angeles News Service v. Tullo*, 973 F.2d 791, 795 (9th Cir. 1992) ("First Amendment concerns are also addressed in the copyright field through the 'fair use' doctrine. . . .").

In the copyright context, then, First Amendment scrutiny has not come in the form of application of intermediate scrutiny, as petitioners urge, but by assuring that the statute has enough play in it to accommodate First Amendment interests. Thus, this Court did not apply intermediate scrutiny in *Harper & Row* when determining whether or not a First Amendment defense allowed The Nation to copy excerpts from former President Ford's memoirs. Rather than asking whether or not the

copyright law furthered an important government interest unrelated to the suppression of free speech, and whether the incidental restriction on expression was no greater than necessary to further that interest, as the Court would have if it were applying intermediate scrutiny, this Court instead merely considered (and rejected) the notion that the public importance of the excerpts might have had some bearing on whether or not they were a fair use of the copyrighted excerpts. *Harper & Row*, 471 U.S. at 555-60.

Similarly, courts of appeals have generally declined to apply intermediate scrutiny—or any such test—to First Amendment challenges to copyright. As the Court of Appeals for the District of Columbia has observed, "[c]ases in which a first amendment defense is raised to a copyright claim do not utilize an *O'Brien* analysis." *United Video*, 890 F.2d at 1190. Rather, "the familiar idea/expression dichotomy of copyright law . . . has always been held to give adequate protection to free expression." *Id.* at 1191.

B. The Intermediate Scrutiny Test Proposed by Petitioners Has Not Been Applied in Related Areas of Law

Copyright law is not the only area of law that has been subjected to First Amendment review by assuring the incorporation of First Amendment protections into the substantive law rather than subjecting each statute in that area to either strict, intermediate, or rationally-related First Amendment review. Like copyright law, the law of defamation and that relating to the right of publicity have both been subjected to First Amendment review without reference to the particular level of scrutiny to be applied and with focus instead on the substantive First Amendment law to be applied. It is simply not true—as petitioners and their *amici* suggest—that all

laws that directly impact speech are automatically subject to either intermediate or strict scrutiny.

In *New York Times v. Sullivan*, 376 U.S. 25[illegible], (1964), this Court held that the First Amendment requires "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.' " *Id.* at 279-80. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), this Court further imposed constitutional requirements on criminal defamation statutes, requiring a finding that false statements made about public officials were made with knowledge of their falsity or with reckless disregard of whether or not they were false, before criminal liability could be imposed. *Id.* at 75-76. It is significant that, even though the Alabama and Louisiana defamation laws at issue in those cases are undoubtedly content based, this Court did not apply strict scrutiny to determine their constitutionality. Like copyright, the appropriate First Amendment-sensitive resolution to challenges to the constitutionality of the defamation statutes lay in assuring that they incorporated certain constitutionally required substantive provisions of law.

It has been recognized that the imposition of strict, intermediate, or rationally-related scrutiny on defamation law would also lead to paralyzing doctrinal confusion. Consider the "fact/opinion dichotomy" found in libel law. That distinction serves much of the same First Amendment-protective function as the idea/expression dichotomy and fair use doctrine in copyright law. Significantly, the distinction is content based. While this Court has determined that the First Amendment does not require a separate "opinion privilege" limiting the application of state defamation laws, *see Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), it did hold that only the assertion of false statements of fact are subject to redress

under libel law, *id.* at 19-21, and in doing so it assured—without the slightest reference to strict scrutiny—that libel law sufficiently accommodated First Amendment interests. As one commentator has noted:

> "While the First Amendment does require that state defamation law be limited to false assertions of 'fact,' American courts have never held that the actual doctrinal content of the 'fact-opinion' distinction as it exists in defamation law is subject to the overriding 'macro-doctrine' of First Amendment 'strict scrutiny.' Indeed, any such attempt would result in utter doctrinal chaos. Thus, it has always been understood that the substance of the 'fact-opinion' doctrine itself supplies the First Amendment standard. From a First Amendment perspective, the Supreme Court requires that states impose defamation liability only for false statements of fact; beyond that minimum, states are left to themselves to craft the precise contours of the 'opinion' defense. The methodology of 'strict scrutiny' (or even 'intermediate scrutiny,' for that matter) is simply irrelevant. A similar mechanism operates in copyright law. While the Supreme Court has stated that the idea-expression dichotomy and the fair use doctrine eliminate any tension between copyright law and the First Amendment, the Supreme Court and the uniform jurisprudence of the lower courts have never treated the First Amendment as an independent font of detailed copyright doctrine (or even intimated such a principle), but instead has assumed that sufficient protection for freedom of speech inures in the structure of copyright law itself."

Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 Nw. U. L. Rev. 1099, 1158-59 (2002).

The law of the right of publicity provides another analogy. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), this Court made clear that an Ohio state law providing for a cause of action for the right of publicity—which provided that a person could not use another's name or likeness for commercial gain without permission—was not immune from First Amendment scrutiny. But once again, the Court did not apply strict scrutiny (or even intermediate scrutiny, for that matter) to right of publicity law, even though it undoubtedly restricted speech on the basis of content. Rather, it applied a more deferential standard of review, acknowledging the careful balance that right of publicity laws strike in order to promote creative activities.

In *Zacchini*, a television station broadcast Mr. Zacchini's entire human cannonball act—approximately 15 seconds long—without Zacchini's permission. *Id.* at 563-64. The question before this Court was whether the First Amendment required the recognition of a "newsworthiness" privilege broad enough to immunize the television station from a right of publicity claim resulting from its unauthorized broadcast of the performance. *Id.* at 565-66. The Court declined to find such a privilege, noting that the protections provided by the right of publicity worked to foster and enhance First Amendment values in much the same way that copyright does:

> "Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court."

Id. at 576.

Notably, those courts that have subjected right of publicity laws to First Amendment scrutiny have devised a test that—like that used in copyright law—requires the inclusion of First Amendment-protective elements in the law rather than subjecting the right of publicity laws to either intermediate or strict scrutiny. The California Supreme Court has provided the most extensive opinion on the matter to date in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001), *cert. denied*, 122 S. Ct. 806 (2002).

In *Comedy III*, the registered owner of the rights to the former comedy act known as The Three Stooges sued an artist who, without permission, had sold lithographs and T-shirts bearing a likeness of The Three Stooges reproduced from a charcoal drawing he had made. *Id.* at 800-01. The artist claimed that enforcement of California's right of publicity statute against him under the circumstances violated his First Amendment rights. *Id.* at 802. As this Court did in *Zacchini*, the California Supreme Court analogized the right of publicity to copyright, concluding that "[t]he right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility." *Id.* at 804. The court further noted that the right of publicity, like copyright, shares a common goal with the First Amendment of encouraging free expression and creativity. *Id.* at 808. Like copyright, it accomplishes that goal, in large part, "by protecting the creative fruits of intellectual and artistic labor." *Id.*

In crafting a First Amendment test for the right of publicity, the California Supreme Court considered and rejected the suggestion of many commentators that the doctrine of fair use be incorporated wholesale from copyright law into right of publicity law. *Id.* at 807-08. The court did, however, incorporate part of the fair use inquiry—specifically, the part that inquires whether or not the use in question is "transformative." *Id.* at 808

(citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). The court concluded that "when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements . . . ." *Id.* at 810.

The Tenth Circuit read a similar First Amendment defense into an Oklahoma right of publicity statute in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996). In that case, the court found a trading card company's First Amendment rights provided a parody defense to a right of publicity claim stemming from the sale, without the permission of the baseball players union, of trading cards with caricatures of major league baseball players on them. The court argued by analogy to copyright, which it noted, has "built-in mechanisms that serve to avoid First Amendment concerns of this kind"—specifically, a fair use exception that applies to parody. *Id.* at 970. The court applied a "balancing test" of the First Amendment rights of the card company with the right of publicity of the baseball players and concluded that the First Amendment required a parody defense on the facts of that case. *Id.* at 976.

It is telling that, even though both the California and Oklahoma right of publicity statutes directly restricted the content of certain people's speech, neither court applied strict scrutiny. Rather, both courts assured that a substantive First Amendment defense was available in the right of publicity statutes themselves. In the intellectual property context—where free expression is often paradoxically promoted by restricting some speech—this

is both the dominant and most sensible First Amendment approach.[4]

Application of intermediate or strict scrutiny tests to any of these arenas, including copyright, would lead (in Professor Smolla's language) to "utter doctrinal chaos." Smolla, 96 Nw. U. L. Rev. at 1159. Consider that the two doctrines that courts have held to accommodate free speech interests in copyright—the idea/expression dichotomy and the fair use doctrine—are both heavily laden with content distinctions. If petitioners and their *amici* are right about the appropriate method for determining the appropriate standard of review for copyright laws, then those provisions of existing copyright law providing for the idea/expression dichotomy and the fair use doctrine—*i.e.*, 17 U.S.C. § 102(b) (idea/expression dichotomy) and 17 U.S.C. § 107 (fair use)—would be subjected to strict scrutiny. The fair use doctrine and the idea/expression dichotomy both allow certain exemptions from copyright that take into account, among other things, the content of the expression copied. Yet it has never even been seriously suggested that strict scrutiny applies to those doctrines. Rather, Congress and the courts have taken the opposite approach—namely, that the doctrines of fair use and the idea/expression dichotomy themselves provide the accommodation of First Amendment interests that is required of copyright laws.

The multi-tiered scrutiny tests simply do not fit comfortably within the realm of copyright. The doctrine of applying heightened scrutiny to judge specific laws

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[4] This Court's recent analysis of Congress' effort to impose criminal penalties on virtual child pornography is noteworthy. In *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), the Court held the Child Pornography Prevention Act of 1996 unconstitutional for failing to comport with the First Amendment principles without even adverting to (or *sub silentio*, applying) strict scrutiny.

impacting upon fundamental speech rights arose to fill a void—and address a concern—that does not exist in copyright. Cases that employ heightened scrutiny do so out of their concern that fundamental speech rights not be impeded. But within the copyright context, the baseline for judging is already much different as copyright is recognized as an ally to First Amendment interests themselves.

The intermediate scrutiny test proposed by petitioners and their *amici* would also lead to absurd results. Petitioners and their economist *amici* argue that the CTEA is unconstitutional because the benefits of the 20-year term increase are too speculative a gain to satisfy the intermediate scrutiny test of *Turner*, which requires that a regulation not burden substantially more speech than necessary. If petitioners are right about the correct standard of review, then the government would have the burden of affirmatively showing that the duration of the term does not withdraw substantially more works from the public domain than is necessary to "promote" the arts.

But how is one to determine whether a copyright term of life-plus-fifty years (or seventy) withdraws more works from the public domain than is necessary to promote the arts? Or whether making a term extension retroactive will encourage sufficient artistic output for the collective good when compared to the corresponding delay of other works entering the public domain? Or whether the societal benefits of substantially conforming America law with that of the European Union by providing copyright protection of life-plus-seventy years outweighs the social benefits of placing previously copyrighted works in the public domain? Or, indeed, whether the benefits to the creative processes of *any* copyright law outweigh their costs? These decisions were either made by the Framers themselves or left by them for

Congress to make, subject to only the most limited judicial review. Nothing in First Amendment law requires any different result.

CONCLUSION

The CTEA does not violate the First Amendment. Because copyright law will continue to be an "engine of free expression" if the CTEA is upheld, the First Amendment challenge to the CTEA should be rejected.

Dated: New York, New York
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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, In his official capacity as Attorney General,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICI CURIAE OF THE BUREAU OF NATIONAL AFFAIRS, INC.; CCH INCORPORATED; HOUGHTON MIFFLIN COMPANY, INC.; THE MCGRAW-HILL COMPANIES; REED ELSEVIER INC.; AND THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

Amici are five corporations—The Bureau of National Affairs, Inc., CCH Incorporated ("CCH"), Houghton Mifflin Company, Inc., The McGraw-Hill Companies, Reed Elsevier Inc.—and one trade association, the Software & Information Industry Association ("SIIA").

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[1] No entity or counsel apart from those whose names appear on this brief have contributed monetarily or substantively to its production, and consent to its filing has been lodged with the Clerk of the Court.

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The Software & Information Industry Association ("SIIA") is the leading trade association committed to promoting and protecting the interests of the software and information industries. SIIA represents over 800 member companies, including prominent publishers of software and information products for reference, education, business, consumer, the Internet and entertainment uses.

Each of these corporations and SIIA's members create and distribute original works of authorship. Their ability to do so is directly affected by the operation of the United States copyright system. Events since the passage of the

Copyright Revision Act of 1976 make it critical that Congress retain the constitutional authority to amend the law in response to technological and international developments.

Amici file this brief in support of respondent Attorney General because of the implications of petitioners' arguments for the functioning of the U.S. copyright system. Petitioners assert limits on Congress's authority under the Copyright Clause that, if adopted, would significantly curtail the ability of Congress to enact effective copyright legislation in the future; those arguments also cast doubt upon many past exercises of the copyright power that *amici* rely on to protect their intellectual property.

SUMMARY OF ARGUMENT

The complaint in this case appears not to present a justiciable controversy. Petitioners base their standing to sue the Attorney General on their alleged fear of criminal prosecution if they reproduce works originally published in the 1920s that have remained in copyright because of the 1998 Copyright Term Extension Act ("CTEA").[2] Petitioners, however, do not allege that they have actually infringed any 1920s copyrights, nor do they allege that there are specific, named works they wish to reproduce, that those works are, in fact, still in copyright, and that petitioners have been unable to secure permission to publish from the copyright owners. Petitioners have not been threatened with either prosecution or civil suit. And, even if one of the petitioners were to infringe an existing copyright at some time in the future, the possibility of a federal prosecution for activities of the type in which they engage is, at best, extremely remote. In these circumstances, petitioners' wholly subjective "fear of prosecution" for actions they have

[2] Pub. L. No. 105-298, 112 Stat. 2827 (1998).

not taken does not establish justiciability. Their failure to specify the actions they wish to take also deprives the case of the concreteness that Article III requires.

On the merits, petitioners base their position on an extraordinarily narrow and incorrect view of Congress's power under the Copyright Clause. According to petitioners, the *only* purpose that can support a copyright law—*i.e.*, the *only* way that such a law can be said to "Promote the Progress" of literature and art—is for it to provide incentives for authors to create new works. According to that view, the new term of copyright provided by the CTEA cannot be applied to works created before enactment of the CTEA because "a term granted to a work already in existence, does not promote Science." Pet. Br. 10.

This oddly wooden limitation is completely inconsistent with the theory and history of U.S. copyright laws. It fails to take into account that the first U.S. Copyright Act[3] accorded statutory copyright to works already in existence, that every term extension since 1790 has applied to works already in existence, and that other new benefits of copyright, such as increased penalties for infringement and new exclusive rights for copyright owners, have also commonly (and common-sensically) been made available to the proprietors of existing copyrights, as well as to authors of future works. Petitioners' crabbed limitation on Congress's power would not only invalidate a wide array of copyright laws enacted by Congress in the past, it would also hamstring the ability of Congress to enact future copyright statutes to deal with threats to the rights in existing works.

Finally, petitioners' invocation of the First Amendment turns on their assumption that the "freedom of speech"

[3] Act of May 31, 1790, 1 Stat. 124.

protected by that Amendment includes the right to mechanically reproduce and distribute the copyrighted works of others without their permission, and even against their expressed wishes. *Amici* doubt the validity of that premise. But even if copyright infringement is to be considered as constituting First Amendment activity, Congress's enactment of a valid, content neutral copyright law pursuant to an explicit Article I power merely constitutes action supported by important governmental interests. And inclusion of a broad fair use provision in that law, coupled with the doctrine that copyright protects only an author's particular means of expression—not the ideas set forth through that expression—amply satisfies any narrow tailoring requirement.

ARGUMENT

I. THE PETITION DOES NOT PRESENT A JUSTICIABLE CONTROVERSY

Although justiciability was not questioned below,[4] *amici* believe that the complaint in this case does not present a justiciable controversy. This Court has repeatedly emphasized that constitutional issues may be resolved by federal courts only when those issues arise between real adversaries in a concrete factual context.[5] The present proceeding does not remotely meet that standard.[6]

[4] In the court of appeals, respondent questioned petitioners' standing to claim that the First Amendment is violated by the application of the CTEA to works "yet to be created." *See Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001). Petitioners no longer challenge the constitutionality of the CTEA's prospective application. *See* Pet. Br. 48.

[5] *See, e.g.*, *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89 (1947) ("For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field.") (internal citation omitted); *Valley Forge v. Americans United for Separation of Church*

Petitioners and their *amici* have a strong philosophical disagreement with Congress's 1998 decision to extend the term of U.S. copyright by 20 years. They seek to bring that policy dispute to this Court by basing a constitutional claim on their allegation that "certain of the plaintiffs were preparing to use in some way" works that would have fallen out of copyright[7] but for enactment of the CTEA, and that these unspecified petitioners have a "fear of prosecution" if they do so. Pl.'s 2d Amd. Compl. ¶14. Petitioners have not, however, named the works certain of them wish to use, stated the way in which those petitioners wish to use those works, alleged that the works are still, in fact, in copyright or alleged that the use petitioners wish to make of the works would actually be prohibited by the Copyright Act. Nor do petitioners allege that they cannot obtain permission from copyright owners to use the works. Petitioners indeed have not even included as defendants, much less identified, the

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and State, 454 U.S. 464, 472 (1982) (Legal questions must be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J. dissenting) ("[C]ourts will not pass upon . . . abstract, intellectual problems, but adjudicate concrete living contest[s] between adversaries.") (internal quotation omitted).

[6] A defect in subject-matter jurisdiction is, of course, not waivable by the parties and may be raised at any time, including by the Court on its own motion. *See, e.g., Ins. Corp. of Ireland Ltd. v. Companie des Banxites de Guinee*, 456 U.S. 694, 702 (1982).

[7] The CTEA added a twenty-year extension to the term of subsisting copyrights. A work published in 1923 would have initially been entitled to two 28-year terms of copyright if the author complied with applicable statutory formalities, terms that would have ended in 1979. When Congress passed the comprehensive 1976 revision of the Copyright Act, it extended the term of subsisting copyrights so that copyrights in their second 28-year term would have a term of 75 years from the date of publication. Thus, works published in 1923 would have fallen out of copyright at the end of 1998, the year in which petitioners' complaint was filed, but for the enactment of the CTEA in October of that year.

owners of the copyrights in the works in which they supposedly are interested. They seek relief only against the Attorney General, who has no civil copyright enforcement authority and who has never threatened criminal enforcement against petitioners or allegedly prosecuted anyone for activities similar to those in which they purportedly wish to engage. Petitioners thus present an unripe, academic and completely hypothetical controversy against a nonadversarial party defendant. Such a "case" is not justiciable.

A. The Attorney General Is Not A Proper Defendant In The Absence Of A Credible Threat of Federal Criminal Prosecution

The federal Copyright Act creates private rights that are almost entirely privately enforced. The United States does not civilly enforce the rights of copyright owners, nor does it claim copyright in its own works. The Attorney General is thus not an adverse party[8] in this case unless petitioners are under a real and immediate threat of criminal prosecution by the United States.[9] Petitioners allege no such threat and, in fact, none exists.

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[8] The Attorney General must, however, be given notice of federal court challenges to the constitutionality of an Act of Congress affecting the public interest, and may intervene if he so wishes. 28 U.S.C. § 2403(a). This intervention authority applies only when a justiciable controversy against an actual adversarial defendant exists; it plainly does not authorize suit to be brought against the Attorney General simply because plaintiff wishes to challenge the constitutionality of a federal statute.

[9] *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 491, 493 (1974) (complaint seeking declaration against officials based on discriminatory prosecution practices dismissed because no plaintiff was facing prosecution); *Boyle v. Landry*, 401 U.S. 77, 80-81 (1971) (dismissing declaratory judgment action against criminal intimidation statute because no plaintiff had actually been charged under the statute); *Golden v. Zwicker*, 394 U.S. 103, 109 (1969) (First Amendment challenge to statute

Petitioners collectively allege that they have a "fear of prosecution by Defendant [Ashcroft] for violations of the NET Act." Pl.'s 2d Amd. Compl. ¶ 16. No basis for this wholly subjective fear is set forth in the complaint. No petitioner alleges, for example, that he, she or it has ever been investigated, prosecuted or in any way threatened with federal prosecution for copyright infringement. No petitioner even alleges that they have been the subject of any past (or threatened future) *civil* copyright infringement action. The complaint contains no allegation that any person, entity or company that conducts activities similar to those conducted by any of the petitioners has ever been subjected to (or even investigated for or threatened with) a criminal prosecution.[10]

In these circumstances, there is simply no existing threat that any petitioner faces or would face imminent criminal prosecution by the United States even if one or more of the petitioners should, at some time in the future, violate a then-existing copyright. It is important to bear in mind that the occurrence of an act of copyright infringement does not inevitably, usually, or even ordinarily lead to a federal criminal prosecution. Federal prosecutions for copyright infringement are, in fact, extraordinarily rare. *Amici* could, for example, find no criminal case under the 1976 Copyright Act—reported or otherwise—in which the basis for prosecution was the reproduction of books or sheet music,

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prohibiting distribution of anonymous election literature non-justiciable because the prospect of prosecution was neither "real nor immediate").

[10] Even were an infringement of a 1923 work to occur, the $1,000.00—within 180 days—threshold for NET prosecution would rarely be met. The described activities of some of the petitioners actually appear to make them legally *immune* from prosecution. Most of the petitioners appear to specialize in out-of-print works and works of extremely limited general interest and valuing the damage caused by the infringement of an out-of-print work is extremely difficult.

much less a criminal case based on the distribution of sheet music or books that were in the last twenty years of their copyright term.[11] The dearth of reported cases is confirmed by *amicus'* practical experience. *Amicus* SIIA has an extensive antipiracy program, through which it enforces copyrights on behalf of its members. In SIIA's experience, even in those instances when hundreds of thousands of dollars are involved, it is *extremely* difficult to convince federal prosecutors to bring cases involving infringements of works released last year, much less seventy years ago. In light of the routine appearance of pirated software, music, and motion pictures on the Internet before or within days of their public release, it strains credulity to believe that the Justice Department would make prosecuting infringement of works published in 1923 a law enforcement priority.[12]

Moreover, not only have petitioners sued a party (the Attorney General) with whom they have no justiciable dispute, they have failed to sue any of the only parties with whom they *might* have such a dispute—the owners of copyrights of works they supposedly wish to reproduce.

Petitioners' failure to include or identify any of the copyright owners whose rights are involved is more than a technical omission. Copyright owners may have important information and highly relevant perspectives to contribute to judicial consideration of the constitutionality of the

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[11] *See, e.g., Department of Justice, Computer Crime and Intellectual Property Division*, http://www.cybercrime.gov/ipcases.html (visited June 21, 2002) (listing representative criminal intellectual property cases in the last three years). The problem of seventy-year old works reproduced on the Internet is not a law enforcement (or even in some cases a copyright owner's) priority.

[12] If a petitioner sought to bring an action for declaratory judgment against a copyright owner, the failure to allege an existing threat of suit for infringement would defeat federal jurisdiction. *See generally* Wright and Miller, Federal Practice and Procedure, § 2761.

application of the CTEA to 1923 works. Petitioners' principal argument on the merits is that Congress had no rational basis for believing that the extension of the 1923 term of copyrights would contribute to the progress of literature, art, and music. The owners of those copyrights—those whom Congress intended to benefit from the extended term—are uniquely situated to provide information about the ways in which an extended term for their works may encourage distribution, preservation or creation of works of literature or art, or otherwise further the many proper objectives of copyright law. Their conspicuous absence deprives this case of the concreteness necessary to render it justiciable.

B. Petitioners Present A Hypothetical And Abstract, Rather Than A Ripe, Concrete Controversy

Petitioners base their standing to sue on their alleged desire to copy, reprint, perform, restore, or sell 1923 works. Pl.'s 2d Amd. Comp. ¶¶ 14, 16. As indicated above, however, petitioners completely fail to specify *which* of those works they wish to use, or to describe *how* they wish to use those works. They allege instead that "*certain of the Plaintiffs* were preparing *in some way*" (emphasis added) to use some such works—primarily those that are out-of-print and of little current commercial value.

By failing to provide specific information about which works they seek to use and how they seek to use them, petitioners have made it impossible to know whether there is a ripe controversy—whether the works they might wish to use are, in fact, presently subject to federal statutory copyright; whether, even if the works are in copyright, petitioners' proposed uses would be prohibited by the Copyright Act; and whether, if petitioners' uses *would*

constitute copyright infringement, those uses might nevertheless be authorized or permitted by the copyright owner, if authorization were to be requested.

Petitioners' failures may be based on an assumption that *any* work created in 1923 would, of necessity, have had its copyright extended by the CTEA, and that any use of any such work by a petitioner would necessarily constitute an act of copyright infringement. Such an assumption would be entirely incorrect.

- *First*, the fact that a work may have been created in 1923 does not mean that the copyright term would have started to run in that year or even within the next several years. In 1923—and indeed for the whole history of the U.S. statutory copyright law between 1790 and 1978—federal copyright protection typically began at the time of *publication* of a work, not at the moment of its creation.[13]

- *Second*, not all works published in 1923 are the subject of statutory copyright protection. Such a work, for example, might fail to meet the constitutionally required standard of originality, see 17 U.S.C. § 101; *Feist Pubs. v. Rural Telephone*, 499 U.S. 311 (1991), or might be a work, such as a sound recording, that was not the subject of federal copyright at that time.[14]

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[13] *See, e.g.*, Act of March 4, 1909, § 10, 35 Stat. 1075 (1909); Act of Feb. 3, 1831, § 5, 4 Stat. 436 (1831); Act of May 31, 1790 § 3, Stat. 124 (1790). Even under current law, a work is not "created" until it is fixed in tangible form. 17 U.S.C. § 102(a).

[14] *See* 17 U.S.C. § 301(c) (pre-1972 sound recordings subject to state common law protection).

- *Third*, many works first published in 1923 may not be under copyright protection, failure to comply because of the formalities that were required in order to obtain and keep statutory copyright. Under the 1909 Act, an author or his or her assignee would irrevocably lose statutory protection if the work were published without a proper notice of copyright.[15] Moreover, if the copyright proprietor did not comply with the complex renewal provisions, the copyright was forfeited at the end of its initial 28-year term.[16]

- *Fourth*, even if copyright were properly obtained and renewed for a 1923 work, the desired use of that work by one of the petitioners may well not be proscribed by today's copyright statute. Petitioner Jill Crandall, for example, alleges that she has been prevented from "freely copying [unspecified musical] works that were copyrighted in 1923" that she wishes to perform with the church choir that she directs. Pl.'s 2d Amd. Compl. ¶¶ 36-38. Even if these works have survived the copyright formalities, their performance at church services is exempted from the exclusive rights that currently belong to a copyright owner. 17 U.S.C. § 110(3). And copying the scores of those works for purposes of a church performance, may—depending upon the size of her choir, whether the scores are out of print,[17] what is done with the

[15] Act of March 4, 1909, § 10.

[16] The initial term of copyright in 1923 was 28 years, with an additional 28-year term potentially available to the copyright owner, but only if an eligible person applied for renewal in the proper form and within the strictly limited window of time provided for that purpose. If renewal were not properly applied for and obtained, copyright would terminate at the end of the initial 28-year term. *See* Act of March 4, 1909, § 24.

[17] *See Harper & Row v. The Nation*, 471 U.S. 539, 553 (1986) (observing that "a key, though not necessarily determinative, factor in

scores after the choir performance, and other factors too numerous to describe[18]—might well constitute fair use of the material, thus providing a complete defense to an infringement action.

- *Finally*, in order to violate the federal copyright statute, a defendant must make the work available *without the consent of the copyright owner*. Having failed to specify the works they wish to use, petitioners obviously cannot (and do not) allege that they have sought permission from any copyright owner to republish any work, or that they have been unable to obtain permission.

In sum, petitioners allegations show, at most: (1) that some works created in 1923 are presently subject to copyright; (2) that some petitioners might at some time wish to use one or more or these works; (3) that such uses might possibly be prohibited by the Copyright Act; (4) that the owners of the copyright might possibly not authorize petitioners' uses; and (5) that one or more petitioners therefore might someday possibly be threatened with federal criminal prosecution. A case based on that chain of hypothetical possibilities is not an appropriate context for judicial resolution of the constitutionality of an important federal statute.

fair use is whether or not the work is available to the potential user," and that "If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it"). The nonprofit use of out-of-print material by other petitioners may also constitute fair use.

[18] Fair use is copyright's equitable rule of reason that balances a variety of interests in determining whether infringement is excused in a particular case. *See Sony v. Universal Studios*, 464 U.S. 417, 448 n.31 (1984) (noting the case-by-case nature of fair use).

II. THE CTEA IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE COPYRIGHT CLAUSE

Petitioners argue that the "retroactive" application of the CTEA's new term of copyright to works that existed at the time of the CTEA's enactment is unconstitutional. Pet. Br. 17-31. They base their argument on their assertion that the single permissible purpose that can justify a copyright law—*i.e.*, the only way that such a law can "Promote the Progress" of literature, music and art—is for it to stimulate authors to create new works.[19] Since extension of the term of copyright for a work already in existence cannot serve as an incentive for the production of that work, petitioners argue, such an extension cannot be a valid federal copyright law.[20]

This is an odd and artificially straitjacketed view of what Congress can do to "promote the Progress of Science and useful Arts."[21] It is inconsistent with the theory and history

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[19] *See* Br. or Petitioner at 22-23 (To promote the "Progress of Science," a copyright term must, "stimulate . . 'the creative activity of authors.' . . . Whatever else a [copyright law] may do, it must promote 'creative activity' to satisfy the limits of the Constitution.").

[20] *See* Pet. Br. 22 ("It follows that a blanket extension of existing copyrights cannot be a 'limited Time []' that 'promotes the Progress of Science.' It cannot, because the incentive is being given for work that has already been produced. Retroactive extensions cannot 'promote' the past. No matter what we offer Hawthorne or Hemingway or Gershwin, they will not produce anything more.").

Petitioners similarly argue that extending the copyright term of existing works violates what they call the "Quid Pro Quo Requirement" of the copyright clause. Pet. Br. 23 ("[Congress's] Copyright Clause power is contingent upon an exchange. As nothing is received by the public in exchange for, or conditioned upon, the retroactive extension [of copyright to existing works] CTEA is beyond Congress's power.").

[21] *Amici* agree with the court of appeals that the introductory language of the Copyright Clause is not a judicially enforceable limitation on Congress's powers under that Clause. *See Eldred v. Reno*, 239 F.3d 372, 380 (D.C. Cir. 2001). Because *amici* understand that

of U.S. copyright laws and it fails utterly to appreciate that progress in art, literature and music and knowledge in society can be promoted in a variety of ways in addition to the direct stimulation of the creation of new works. The reasons given by Congress for enactment of the CTEA, such as encouraging dissemination, increased life expectancy of authors and their heirs, and international harmonization are more than sufficient for the exercise of its Article I power, and are consistent with the historical exercise of that power over the last 200 years. If adopted, petitioners' contention would handcuff Congress in addressing important copyright problems in the future, and it would, in addition, render unconstitutional all or part of virtually every copyright statute that Congress has ever enacted.

A. Petitioners' Argument is Inconsistent With the History of the Copyright Clause, and Takes an Unduly Narrow View of How Congress May Promote Progress

1. Throughout most of the history of federal copyright law, that law provided protection upon publication and dissemination, not upon creation.

For almost two hundred years, with minor exceptions, federal copyright protection did not attach upon creation of a work, but only when the work was published with the necessary formalities—*i.e.*, when copies of the work were distributed to the public with notice of copyright.[22] During

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respondent and other amici will address this point in detail, we focus our comments on petitioners' incorrect interpretation of the constitutional language.

[22] See, *e.g.*, Act of March 4, 1909, § 10 ("Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title."). Under § 12

the time period between a work's creation and its publication, copyright protection was the exclusive province of state law.[23] Thus, for most of its history, federal copyright law directly provided incentives to the process of *dissemination*, not creation.[24] It was not until January 1, 1978, the effective date of the Copyright Revision Act of 1976, that federal copyright protection attached at the time of a work's creation and fixation in tangible form.

Clearly, the Congress that enacted the first federal copyright law in 1790, and the Congresses that enacted the major copyright revision laws in 1831,[25] 1870[26] and 1909[27] were primarily concerned with enacting laws pursuant to the Copyright Clause to promote publication and distribution of existing works—something petitioners now tell us is an inadequate constitutional basis for a copyright law.[28] Moreover, even in making the fundamental shift from a publication-oriented copyright law to one that initiates protection upon fixation of original works of authorship, the 94th Congress continued to show its concern with encouraging dissemination. Section 303(a) of the 1976 Copyright Act revision terminated state protection for existing unpublished works, substituting federal statutory protection until December 31, 2002. But if the work were

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of the 1909 Act, statutory copyright protection was available for certain unpublished works, such as lectures and photographs, that were typically publicly exploited by being performed or exhibited without the distribution of copies to the public.

[23] Under § 2 of the 1909 Copyright Act, there was no federal pre-emption of state protection for unpublished works.

[24] See Gorman and Ginsburg, Copyright 347 (2002).

[25] Act of Feb. 3, 1831, 4 Stat. 436.

[26] Act of July 8, 1870, 16 Stat. 212.

[27] Act of March 4, 1909, 35 Stat. 1075.

[28] Patent law similarly has always focused its protection on the act of making an invention available to the public, not on the act of invention itself. *See Kewanee Oil v. Bicron Corp.*, 416 U.S. 470, 491-92 (1974) (policy of patent law is to encourage disclosure).

published prior to that date, the work was to remain in copyright for 25 additional years. The 94th Congress thus extended copyright protection for works created by authors "dead for many years, or even centuries." M. Nimmer & D. Nimmer, Nimmer on Copyright, § 5.04.

2. The First Congress clearly understood that its power under the Copyright Clause extended beyond providing incentives for the creation of new work; later Congresses have followed suit.

The Congress that enacted the first Copyright Act in 1790 established a term of federal statutory copyright protection for works to be published in the future—*i.e.*, after enactment of the 1790 Act. In doing so, Congress provided incentives for authors to create new works. But the 1790 Act also afforded federal statutory protection to works already in existence.[29] The First Congress thus could not possibly have believed that its power under the Copyright Clause was, as petitioners contend, artificially and absolutely limited to enactments that would provide incentives for the creation of new works.[30] As the court of appeals correctly observed, "the First Congress was clearly secure in its power under the

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[29] The 1790 Act afforded authors protection for "any map, chart, book or books, already printed within the United States," as well as those "already made and composed, but not printed or published, and that shall thereafter be made and composed." Act of May 31, 1790, § 1.

[30] Congress took the same action in 1976 when it converted existing state common-law rights into federal statutory ones. As it had in 1790, Congress in 1976 gave federal protection to works that had already been produced. It could not have done so if it believed that its only authority was to incentivize new works. Nor was Congress in 1790 or 1976 required to protect works already in existence in order to avoid unjustifiable destruction of existing rights under state law. If it truly believed—as petitioners contend—that it had no constitutional power to confer rights on works already in existence, it could simply have let the States continue to protect those works.

Copyright Clause *to extend the terms of subsisting copyrights* beyond those granted by the States."[31] And, as this Court noted well over a century ago:

> "[t]he construction placed on the constitution by the first [copyright] act of 1790 ... by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is entitled to very great weight."[32]

Furthermore, every time a subsequent Congress has increased the term of copyright protection it has increased the term of protection for subsisting works, as well as for works yet to be created. Congress took such action in 1831, 1909, 1976 and 1998. This consistent understanding of Congress's copyright power to provide additional protection for existing works has remained legally unchallenged until the instant litigation.[33] Such unchallenged congressional action over the length of our Nation's history is entitled to great weight: "[W]hen it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive." *Burrow-Giles*, 111 U.S. at 57.

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[31] 239 F.3d at 379 (emphasis added).

[32] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1883). Seventeen members of the First Congress had been delegates at the Constitutional Convention. See *Lynch v. Donnelly*, 465 U.S. 668, 674 (1983).

[33] Similarly, each of the interim extensions that preceded the enactment of the Copyright Revision Act of 1976 extended the renewal *term of subsisting copyrights* that, but for those extensions, would have expired while Congress considered adoption of that omnibus new law. M. Nimmer and D. Nimmer, Nimmer on Copyright, § 9.11[A]. Once again, Congress lacked this power if petitioners are correct.

3. Throughout History, Congress Has Frequently Enacted Copyright Laws That Cannot Be Explained As Designed Only To Provide Incentives For The Creation Of New Works.

As was true in 1790, and in all legislation regarding copyright terms since that time, Congress has repeatedly used its Article I power to enact provisions *that did not encourage the creation of new works.*

(a) Applying New Rights To Existing Works

When Congress has conferred new exclusive rights on copyright owners it has ordinarily made these rights available, not only to the authors of works to be created after enactment of the new law, but also to the proprietors of existing works. For example, when Congress enacted the Visual Artists Rights Act of 1990,[34] it expressly made the new statutory rights of integrity and paternity applicable to works created prior to the effective date of the Act.[35] Similarly, when Congress in 1976 expanded the rights of copyright proprietors to include the exclusive right to publicly display certain works, it made that new right applicable to both existing and future works.[36] And while

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[34] Pub. L. No. 101-650, 104 Stat. 5089 (1990).

[35] 17 U.S.C. § 106A(d)(2) (providing rights of paternity and integrity if author held title as of effective date). *See also Martin v. City of Indianapolis*, 982 F. Supp. 625, 638 (S.D. Ind. 1997) (Work created in 1987 deemed within ambit of Act); Edward Samuels, The Public Domain in Copyright Law, 41 J. Copyright Soc'y U.S.A. 137, 172-73 (1993) (discussing the manner in which Congress has over the entire history of the copyright laws, expanded rights in existing works).

[36] 17 U.S.C. § 301(a). Under this provision, all of the exclusive rights set forth in § 106 apply to works of authorship created before or after the effective date of the Act. *See also* Digital Performance Right in

the subject matter of copyright was extended by Congress to include musical compositions in 1831, it was not until 1897 that the law was amended to provide copyright owners with the exclusive right to publicly perform musical works.[37] It has always been understood that this new public performance right applied to works existing at the time of the 1897 amendments, as well as to works produced after 1897.

Other examples abound of adding new rights to existing copyrights. For instance, when Congress increased the penalties for civil and criminal copyright infringement, it applied the new increased penalties not only to infringement of future works, but also to works already in existence on the effective date of the increases. *See* the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774. Congress has taken similar "retroactive" action when it has enacted laws in response to harmful marketplace practices made possible by new technologies. For instance, both the Record Rental Amendment Act of 1984[38] and the Computer Software Rental Act of 1990[39] prohibited unauthorized rental practices that displace the sales of copyrighted works. These laws applied to music and software created and copyrighted prior to their dates of enactment, as well as to works created after those dates.[40] And, when Congress enacted the comprehensive 1976 revision of the Copyright Act, as a

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Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (granting to existing copyright owners the new right to publicly perform sound recordings by means of digital transmission).

[37] *See* Act of Jan. 6, 1897, 29 Stat. 481.

[38] *See* Pub. L. No. 98-450, 98 Stat. 1727 (1984); *see also* S. Rep. No. 98-162 at 2 (1984).

[39] Pub. L. No. 101-650, 104 Stat. 5089 (1990).

[40] In order to avoid penalizing reliance on the fact that the law previously did not prohibit these rental practices, both laws did not apply to copies acquired prior to the date of enactment and in possession of the renter as of that date.

general matter it applied the Act's rights and protections both to pre-existing and future works.[41] Congress could not have taken any of these actions if, as petitioners contend, it may not use the copyright power to extend the protection of existing copyrights.

(b) Other Examples

The foregoing examples demonstrate how Congress has consistently promoted progress by applying new rights and protections to existing works—something Congress could not do if petitioners' arguments were to be taken seriously. Congress has also enacted a host of other laws that cannot possibly be explained as inducing the creation of new works even in their wholly *prospective* application. Thus, Congress has passed laws to exempt from the exclusive rights of copyright owners activities such as the public performance or display of works during certain face-to-face teaching activity (§110(1)), performances and display during the course of religious services (§ 110(3)), the playing of radio and television broadcasts to customers by certain commercial establishments (§110(5)), and the performance of nondramatic literary or musical works by nonprofit fraternal and veterans' organizations (§110(10)). Enactment of such exemptions cannot possibly induce the creation of new works.

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[41] To take another example, the cable television compulsory license contained in the 1976 Act, 17 U.S.C. § 111, for the first time required cable operators to pay for the retransmissions of existing and future copyrighted works. As its legislative history makes clear, that provision was designed, in part, to facilitate dissemination of broadcast programming on a national basis. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710 (1984) (noting that in enacting the compulsory license, Congress clearly sought to further copyright clause goals by allowing the public to benefit from wider dissemination).

Also completely unrelated to creating incentives for the protection of new works is the Copyright Renewal Act of 1992,[42] which eliminated the need for copyright owners of works then in their initial term of copyright to take any action to renew their copyrights in order to obtain the 28-year statutory renewal term. Congress's actions had nothing to do with stimulating the creation of new works; it sought to address longstanding concerns that the renewal process had functioned as a trap for the unwary, and removed this trap by automatically granting the renewal term to existing works.[43] The deposit and registration provisions of the copyright law also promote the progress of arts and sciences by enriching the collections of the Library of Congress, and facilitating business transactions between copyright owners and potential licensees.[44]

B. Freed Of Petitioners' Crabbed Interpretation Of Congress's Power, The CTEA Easily Passes Constitutional Muster

The foregoing discussion illustrates the broad variety of ways in which Congress has used its copyright power for purposes other than stimulating the production of new works. It has protected existing copyrights against new means of infringement, expanded the exclusive rights of the proprietors of existing copyrights, increased penalties for the

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[42] Pub. L. No. 102-307, 106 Stat. 274 (1992).

[43] *See also* 17 U.S.C. § 202 (overturning series of state court decisions holding that absent an agreement to the contrary, authors or artists who sold a manuscript or work of art transferred the copyright as well as physical object); H.R. Rep. No. 94-1476, at 124 (1976) (explaining the rationale for the provision).

[44] *See* 17 U.S.C. §§ 701 *et. seq.* (describing operation of the Copyright Office), 407-412. In upholding the deposit requirement, one court has found it within Congress's power because it "sustains a national library for the public use." *Ladd v. Law & Technology Press*, 762 F.2d 809, 812 (9th Cir. 1985).

infringement of existing copyrights, conferred copyright on pre-existing works, increased the term of existing copyrights, and removed traps through which proprietors of existing works might lose rights. Congress has also acted to enrich the collections of our national library, to provide comprehensive copyright-related records, to harmonize our laws with those of other nations, and to bring our laws into conformity with international norms.[45] If petitioners' artificially narrow interpretation of Congress's power were to be adopted, all of these laws would be unconstitutional, for none of them can be explained as efforts to stimulate new creation. Congress's ability to enact copyright legislation in the future would also be greatly compromised, rendering Congress incapable of adequately fulfilling its constitutional responsibility to promote the progress of art, films, literature and music.

Suppose, for example, a new form of piracy arose that current copyright law did not adequately address. Petitioners would permit Congress to amend the law to prohibit this new form of piracy for works created *after* the amendment is

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[45] *See* Berne Implementation Convention Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. On several occasions, Congress has noted its concern that domestic copyright terms were less generous than those in other nations. When it passed the 1831 Act, Congress announced that one of its key objectives was "to enlarge the period for the enjoyment of copy-right, and thereby place authors in this country more nearly upon equality with authors in other countries." 7 Reg. Deb. 21, Cong. 2d Sess. App. CXIX (Dec. 17, 1830). Similarly, the legislative history of the 1976 Act reveals that, in increasing copyright terms, Congress was motivated in part by an interest in conforming U.S. terms to those in foreign nations. *See* H.R. Rep. No. 94-1476, at 134-136 (1976). ("The arguments as to the benefits of uniformity with foreign laws, and the advantages of international comity that would result from adoption of a life-plus-50 term, are also highly significant"). *See also* Supplemental Report of the Register of Copyright on the General Revision of U.S. Copyright Law, 87-88 (1965) ("[I]t is ... increasingly important to have the duration of U.S. copyrights conform to that prevalent abroad.").

enacted, but they deem it unconstitutional for Congress to protect *existing* works from the new brand of piracy, for such an amendment could do nothing to stimulate the creation of existing works.[46] Nor, if copyright infringement became a more serious problem, could Congress increase the criminal penalties for infringements of existing works, or the level of statutory damages, for again those increases could not possibly stimulate création of the works they would protect. Such results would not only be unfortunate, they would be patently absurd.

This Court should, instead, recognize Congress's authority to select means, in its rational judgment, best further the numerous goals of the Copyright Clause. Once freed of the illogical and artificial limitation petitioners would fasten on Congress's power, it is clear that application of the CTEA's new term of copyright to existing, as well as future, works was completely appropriate. As set forth in the CTEA's legislative history, Congress had ample reasons for following historical practice and applying the CTEA's new term of copyright to existing works. These included creating incentives to preserve and restore older works, helping to harmonize U.S. copyright laws with the laws of other nations, adequately rewarding authors and protecting their heirs in view of increased life expectancies, and responding to new technologies that increase opportunities for proprietors of existing copyright to disseminate their works.[47]

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[46] Nor would it be part of the "bargains" struck with the authors of existing works at the time of their creation. *See* Pet. Br. 23.

[47] The rationality of Congress's actions with respect to the CTEA is also reflected in the manner in which it conducted its legislative inquiry. It utilized its fact-finding capabilities by holding balanced hearings that evoked both strong support for and opposition to the term-extension proposal. The Senate Judiciary Committee produced a thorough and balanced Committee Report. Moreover, during the course of the legislative process that covered two Congresses, changes were made to

Application of the CTEA's new copyright term to existing works adheres to a common-sense tradition that dates back to the very first federal copyright law in 1790. The congressional action challenged in this case was thus neither unprecedented nor aberrational—as petitioners contend. It *would* have been aberrational had Congress decided *not* to extend the CTEA's new copyright term to existing copyrights. Congress had never before drawn an arbitrary line that would leave authors of older works with less protection that authors of future works. The Constitution does not require it to do so now.[48]

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the proposal to accommodate concerns raised about the breadth of the proposed term extension. For example, the CTEA includes a provision, 17 U.S.C. § 108(h), that provides an exemption from copyright infringement during the extended term for qualified libraries, archives and nonprofit educational institutions engaged in activities in the public interest.

[48] Congress is surely entitled to common-sense discretion to decide to make the same set of rules applicable to all copyright proprietors and infringers. *Cf.* 7 Reg. Deb. 424 (statement of Mr. Huntington) (noting that 'justice, policy and equity alike' forbade distinction between existing and pre-existing works) (Jan. 7, 1831). To do otherwise would, in fact, lead to a crazy-quilt of time-specific copyright rules. Under petitioners' position, copyright owners could be accorded only those rights that were part of the copyright law at the time of the creation of each particular work. In judging infringement claims and actions, courts and litigants would have to determine exactly when works were originally fixed in tangible form so as to give the copyright proprietor only those precise rights that existed *at that time*, not protections that might have been added at a later time. It is one thing for Congress to decide for good reason in particular cases not to apply new rights to existing works. It is quite another for this Court to lay down a constitutional rule that would deprive Congress of any ability to apply the same set of rules to all copyrighted materials.

III. APPLICATION OF THE CTEA'S COPYRIGHT EXTENSION TO EXISTING COPYRIGHTS DOES NOT VIOLATE THE FIRST AMENDMENT

Petitioners base their First Amendment challenge to the application of the CTEA to existing copyrights on their alleged constitutional right to express themselves by mechanically reproducing and distributing the copyrighted works of others without permission. It is very doubtful, however, whether appropriating another's copyrighted work without permission—as opposed to copying that may be necessary for the purposes of comment or criticism—is the copyists "speech," for purposes of the First Amendment.[49] In all events, even if mechanical copying of another's copyrighted work without permission *is* protectible speech, application of the CTEA's extension of the term of copyright to existing works easily passes the intermediate-scrutiny test that petitioners invoke.

[49] In rejecting petitioners' First Amendment claim, the court of appeals may have erred when it stated that "copyrights are categorically immune from challenges under the First Amendment." *Eldred*, 239 F.3d at 377. One can imagine a copyright law—such as a law that would provide copyright on the basis of the political viewpoint of a work—that would violate the First Amendment. *See United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152, 1164-65 (D.C. Cir. 1987) (holding that Congress cannot validly enact a private copyright statute to ensure that Christian Scientists enjoy doctrinal purity). However, a content-neutral copyright law that is a valid exercise of Congress's copyright power, that does not purport to protect ideas, but only the particular expression of the author, and that leaves room for others to express themselves without unfairly appropriating an author's work, may well be immune from a First Amendment challenge.

A. Mechanical Copying of Another's Copyrighted Work Without Permission Is Not Free Expression For Purposes of the First Amendment

Petitioners assert that mechanical copying of the work of others and distributing it without their permission constitutes free expression for purposes of the First Amendment: "By barring the unauthorized use or dissemination of copyrighted works, copyright law regulates speech." Pet. Br. 37.[50] That is an extremely dubious proposition. The First Amendment is designed to enable people to publish *their own* expression, not to appropriate and distribute someone else's expression without permission. No expressive conduct is involved in running a photocopier or video tape recorder or in posting another's book on the Internet without the author's permission and against the author's wishes.

Petitioners' unusual claim that intentional copyright infringement constitutes First Amendment activity is not supported by any citation of authority. However, at least two cases in the courts of appeals flatly reject the contention. In *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir 1989), petitioner cable television companies were "in the position of claiming that they have a first amendment right to express themselves using the copyrighted material of others." *Id.* at 1190. The court of appeals held that they did not: "[T]he petitioners desire to make commercial use of the copyrighted works of others. There is no first amendment right to do so." *Id.* at 1191. In reaching this conclusion, the court relied on this Court's decision in *Harper & Row v. Nation Enterprises*,

[50] We join with *amicus* Professor Samuels in questioning petitioners' related contention that the Constitution on its own face creates a "public domain" where one has a constitutional right to appropriate the works of others without their permission. *See* Br. of Prof. Samuels as *Amicus Curiae* at 22-24.

471 U.S. 539 (1985), where the Court considered whether a magazine's unauthorized reproduction of portions of President Ford's memoirs was a violation of the Copyright Act. The court of appeals noted that, in upholding the application of the Act, the Court did not apply First Amendment scrutiny, but instead based its decision entirely on whether the magazine's publication constituted "fair use" under the statute (a claim which the Court rejected). *See also Author's League of America v. Oman*, 790 F.2d 220, 223 (2nd Cir. 1986) ("the cases establish that there is a constitutional right to freely circulate one's ideas .... They do not, however, create any right to distribute and receive material that bears the protection of the Copyright Act.").

The Copyright Act appears not to regulate speech because it does not impose liability based on the content of the defendant's *own* expression. Independent creation is a complete defense to infringement, and liability only flows based on those portions of a work that are copied from another. To the extent that any petitioner in this case claims an interest in publishing *their own* expression, petitioners fail to explain how the idea/expression dichotomy and the Copyright Act's fair use doctrine fail to protect that freedom.[51]

[51] Petitioners' contention that mechanical copying is First Amendment activity would, if accepted, raise doubts, not only about the Copyright Act, but also other federal statutes that prohibit unauthorized copying, such as 18 U.S.C. § 1832(a)(2) ("Whoever, with intent to convert a trade secret, copies, duplicates ... or conveys such information") and 18 U.S.C. § 1030 (prohibiting copying of information from a protected computer), as well as numerous applications of the Lanham Act, trade secret law and common law unfair competition and misappropriation doctrines.

B. Application of the CTEA's Copyright Term to Existing Copyrights Satisfies Intermediate Scrutiny

Amici believe that petitioners have not asserted any cognizable First Amendment right, and that the Court's inquiry should end there. Assuming *arguendo* that mechanical reproduction of another's copyrighted material without permission qualifies as protectible free expression, application of the CTEA's extended term of copyright to existing works easily satisfies intermediate scrutiny.[52] Petitioners' argument to the contrary is based entirely on their erroneous assertion that the only legitimate government interest that can validly justify a federal copyright statute is to encourage the production of new works. *See* Pet. Br. 40.

As we have shown in the prior section of this brief, however, Congress's application of the CTEA's new term of copyright to existing copyrighted works was a *valid* and traditional exercise of the copyright power, supported by Congress's desire to promote progress in literature, art and music by encouraging distribution and preservation of existing works, enhancing international harmonization, and taking account of increased life expectancies. . Congress's enactment of a valid copyright statute, pursuant to its express constitutional authority to enact copyright legislation, reflects an important governmental interest satisfying intermediate scrutiny. At the same time, the presence of a broad, flexible fair use provision and other exemptions and limitations in that statute satisfies the intermediate scrutiny requirement of narrow tailoring.[53]

[52] There appears to be a consensus among those urging application of the First Amendment to copyright infringement that intermediate scrutiny would be the appropriate constitutional standard.

[53] *See Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 73 (2d Cir. 1999) (noting that First Amendment concerns are

CONCLUSION

The complaint in this case does not present a justiciable controversy. If the Court reaches the merits of the petition, the decision of the court of appeals should be affirmed.

Respectfully Submitted,

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August 2002

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protected by the fair use doctrine); *New Era Pubs. v. Henry Holt & Co.*, 813 F.2d 576, 584 (2d Cir. 1989) ("The fair use doctrine encompasses all claims of first amendment in the copyright field."); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979) (same); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978) (same); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977).

(31)

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The American Intellectual Property Law Association ("AIPLA") is a national association of more than 14,000 members whose interests lie in copyright, patent, trademark, trade secret, and other areas of intellectual property law. The AIPLA's members include attorneys in private practice and attorneys employed by corporations, universities, and government, and represent both owners and users of intellectual property. Unlike many other areas of practice in which separate and distinct plaintiffs' and defendants' bars exist, most, if not all, intellectual property attorneys represent both intellectual property owners and alleged infringers.

The AIPLA has no stake in the parties to this litigation or the result of this case, other than its interest in seeking the correct interpretation of the law affecting intellectual property.

CONSENT TO FILING OF *AMICUS CURIAE* BRIEF

In accordance with Supreme Court Rule 37.3(a), the AIPLA has obtained written consent to the filing of this brief from the counsel of record for both parties. The consent of the Petitioners has already been filed with the Court and the consent of the Respondent is being lodged herewith.

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1. In accordance with Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae* or its counsel.

SUMMARY OF ARGUMENT

Article I, section 8 of the Constitution grants to Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Sonny Bono Copyright Term Extension Act ("CTEA"), which extended the term of protection for all copyrights subsisting at the time of its passage, is a proper exercise of this Article I power, and is consistent with the First Amendment.

A reversal of the decisions below would create grave consequences for other areas of intellectual property law not directly placed at issue here. Since 1790, many changes to the Copyright Act have enhanced the rights of all holders of extant copyrights, and significant investments have been made based on these enactments. Similarly, the patent laws also have been amended to extend the term, even retrospectively, of protection for existing patented inventions. The likely repercussions of a reversal in this case would be destabilizing and injurious to intellectual property owners and to the nation's economy.

ARGUMENT

I. Reversal Of Congressional Power To Extend Existing Copyright Terms Would Destabilize Other Areas Of The Law

Innumerable transactions have occurred in reliance on provisions of the copyright and patent acts in which longer terms or additional property rights were granted in existing works. Owners of copyright have granted licenses in works

that would otherwise have entered the public domain, or would not enjoy the specific rights the owners have licensed. Those licenses often included significant warranties regarding the validity of the copyrights involved. Licensees have invested enormous sums in projects based on those licenses in reliance on the copyrights. In many cases, those licensees raised money from investors based on the scope and validity of their copyrights as provided for by these acts of Congress. The current stock price of many public companies involved in the film, television, music and other industries that create or disseminate works of authorship is based on anticipated profits from works that are currently protected, but whose protection may be nullified if this Court strikes down the CTEA. Further, this problem would not only apply to transactions occurring since 1998, because, in striking down the allegedly retroactive aspect of the CTEA, this Court would call into question the term extension under the 1976 Act and many prior extensions. This could undermine the fundamental consideration underlying tens of thousands or more transactions involving untold billions of dollars. *Cf. Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. ___, 122 S. Ct. 1831, 1841 (2002) ("*Warner-Jenkinson*, . . . instructed that courts must be cautious before adopting changes that disrupt the settled expectations of the inventing community").

In addition to extensions to the terms of copyright protection for existing works, discussed at II.A.2., *infra*, various additional property rights have been extended to copyright owners after the copyright had already been granted. The expectations of owners currently exploiting these rights would also be unsettled by a reversal here.

One example of this is the Digital Performance Rights in Sound Recordings Act of 1995 ("DPRA").[2] This Act bestows upon sound recording copyright owners the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission."[3] This right was given to any copyright owner, including owners of sound recording copyrights that were granted before the effective date of the DPRA.[4] Without this right the value of many existing works could be destroyed in a moment on the Internet. Additional rights were similarly granted to holders of copyrights for architectural works,[5] increases in the compulsory license fees for existing works,[6] limits on the first sale doctrine for computer software and sound recordings,[7] and as part of Congress' restoration of copyright protection to foreign works as part of the Uruguay Round Agreements Act, in connection with the GATT trade agreement, *see infra*.[8] Thus, in addition to implicating extensions of existing terms, Petitioners' rationale for holding the CTEA unconstitutional would similarly apply to all of the foregoing grants of additional rights in existing works.

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2. Pub. L. No. 104-39, 109 Stat. 336 (1995).

3. 17 U.S.C. § 106 (1995).

4. *Id.*

5. 17 U.S.C. § 120 (1990).

6. 17 U.S.C. §§ 111(d), 115 (1976).

7. 17 U.S.C. § 109(b) (1976).

8. 17 U.S.C. § 104A (1994).

Moreover, the effects of a broad holding prohibiting extensions of existing terms might not be limited to copyright law. Under the Uruguay Round Agreements Act ("URAA"),[9] the term of existing patents was extended from seventeen years from date of issuance to the longer of twenty years from filing or seventeen years from issuance.[10] While the URAA did not extend the duration of every patent, a 1994 study reported that approximately 75 percent of existing patents would be extended an average of 253 days.[11] Many of the patents affected by the URAA's extension are still benefiting from the additional term of protection.[12] Moreover, the URAA was passed as part of the United States' obligations under the GATT international trade agreement. If the URAA patent term extension were held unconstitutional on the same basis as the CTEA is herein being attacked, the United States could be held in default of its obligations under the GATT treaty. The U.S. challenged Canada on this very point in the World Trade Organization, and received a favorable panel decision; *Canada — Term of Patent Protection: Report of the Panel* (WT/DS170/R, May 5, 2000) and a favorable appellate ruling *Canada — Term of Patent Protection: Report of the Appellate Body*, AB-2000-7 (WT/DS170/AB/R, September 18, 2000).

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9. Pub. L. No. 103-465, 108 Stat. 4809 (Dec. 8, 1994) (codified in scattered sections of the United States Code).

10. 35 U.S.C. § 154(a)(2).

11. Mark A. Lemley, *An Empirical Study of the Twenty-Year Patent Term*, 22 AIPLA Q.J. 369, 391-92 (1994).

12. *See generally* Lemley, *supra* note 11.

Other extensions of existing terms have been granted to drug patents[13] and to patents owned by World War I[14] and World War II veterans.[15] These term extensions would be similarly implicated by a broad holding that any grant of additional rights in existing works is impermissible under the Copyright Clause.

II. Congress Has Authority Under The Copyright Clause To Extend Existing Copyrights

A. Extending the Terms of Existing Copyrights Does Not Violate the "Limited Times" Provision

Petitioners' "limited Times" argument is premised on an unduly narrow interpretation of the Copyright Clause, and is inconsistent with Congress' historical practice of granting copyright extensions for existing works.

1. The CTEA Is Consistent with the Copyright Clause

By restricting copyright terms to "limited Times," the Copyright Clause simply prohibits Congress from granting authors a copyright for an indefinite or unlimited time period. The CTEA does not grant authors open-ended or unlimited copyrights. Rather, it establishes copyright terms of precise

13. Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, Title II, 98 Stat. 1585, 1598 (1984) (codified as amended in 35 U.S.C. § 156)

14. Act of May 31, 1928, ch. 992, § 1, 45 Stat. 1012 (1928).

15. Pub. L. No. 81-958, ch. 444, 64 Stat. 316 (1950).

and definite length. *See* 17 U.S.C. § 302 (providing a term of 95 years from publication or 120 years from creation, whichever is shorter, for works for hire and pseudonymous works and a term of the life of the author plus 70 years for other works). The limited copyright terms of the CTEA thus fall within Congress' authority to grant copyrights for "limited Times."

Petitioners note that the Framers first rejected language that would have restricted copyright protection to "a certain time" in favor of for "for limited Times." Pet'r Br. at 17. The Random House Dictionary defines "certain" as "fixed; agreed upon; settled upon," whereas it defines limited as "confined within limits; circumscribed." The Random House Dictionary of the English Language 339, 1115 (2d ed. 1987). When the Framers replaced "certain" with "limited," they replaced a term describing a period that is fixed and settled with a term describing a period that is not necessarily unchanging. Indeed, by making "Times" plural ("limited Times" as opposed to "a certain time"), the Framers used language that broadly permits Congress to set more than one term for a copyright.

2. History Confirms the Constitutionality of Extensions of Copyright Terms for Existing Works

From the First Congress until today, Congress has consistently exercised the power to extend existing copyright terms for "limited Times."[16] Before 1790, twelve of the

16. Since the first federal copyright act in 1790, subsequent Congresses have passed additional extensions which have applied both retrospectively and prospectively. In 1831 Congress extended (Cont'd)

thirteen original states had enacted individual copyright statutes which varied in scope and duration. *See* Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 Bull. Copyright Soc'y 11 (1975); *see also* Bruce W. Bugbee, *The Genesis of American Patent and Copyright Law* 104-24 (1967). To establish national uniformity and enforceability, the First Congress passed the Copyright Act of 1790. *See* Crawford, *supra*, at 36. This Act unequivocally applied to works "already printed within these United States." Act of May 31, 1790, ch. 15, 1 Stat. 124, § 1.

There is no basis in the Copyright Clause for distinguishing between the creation of new federal rights and extending existing ones. Indeed, the 1790 Act demonstrates why the limited times requirement does not preclude the extension of existing copyright terms.

(Cont'd)

the copyright term from 14 years to 28 years, with a 14 year renewal term. Act of Feb. 3, 1831, ch. 16, §§ 1-2, 4 Stat. 436. That act explicitly stated that preexisting copyrights that had not already expired would receive "the benefit of each and all the provisions of this act. . . ." *Id.* § 16. In 1909, Congress increased the renewal term from 14 to 28 years for all copyrights "subsisting in any work at the time when the Act goes into effect." *See* Act of March 4, 1909, ch. 320, § 24, 35 Stat. 1075, 1080. Then, in 1976, Congress extended the copyright term for works of natural persons to "the life of the author and fifty years after the author's death" for works created on or after January 1, 1978, 17 U.S.C. § 302, and extended subsisting copyrights by as much as 19 years — from a maximum term of 56 years to a maximum term of 75 years, *id.* § 304(a), (b). Copyrights in new works for hire and pseudonymous works were similarly extended from a maximum term of 56 years from publication to a term of 75 years from publication or 100 years from creation, whichever is shorter. Congress has also enacted a substantial number of less significant extensions, as stated in Petitioners' brief. Pet'r Br. at 2 n.1. None of the grounds for distinguishing these subsequent extensions (*see* Pet'r Br. at 30 n.13) addresses the limited times, quid pro quo, or originality challenges that Petitioners bring against the CTEA.

First, had Congress understood the "limited Times" requirement to bar any extension of copyright terms for existing works, it would have tailored the first Copyright Act to apply only prospectively. For example, Congress could have allowed state laws to continue to protect existing works for some transition period. Second, Petitioners do not reconcile the retrospective effect of the 1790 Act with their other originality and "quid pro quo" theories. According to Petitioners, once a work is "already in existence" it is no longer original for purposes of copyright protection. Pet'r Br. at 33. Similarly, Petitioners read into the Clause a new, implied and narrow "quid pro quo" restriction, which bars giving an author any additional copyright-related remuneration beyond what the author was entitled to receive at the time the work was created. If Petitioners' theories of originality and quid pro quo were correct, no work already in existence in 1790 should have qualified for copyright protection under the 1790 Act.[17] Yet the Act explicitly applied to "works already printed within these United States."

Both the Copyright Clause and the historical practice of granting copyright extensions for existing works suggest that the CTEA is a proper exercise of Congressional power under Article 1, section 8.

---

17. In addition, Petitioners' quid pro quo theory is inconsistent with other amendments to the copyright law, such as the 1984 amendment 17 U.S.C. § 109 in which Congress created a rental right exception to the first sale doctrine. It also conflicts with numerous laws Congress passed which diminish the exclusive rights of authors with respect to existing works. *See, e.g.*, 17 U.S.C. §§ 108, 110, 111, 112, 1008; Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of United States Code Titles 17, 28, and 35).

The pace of technological advancement relating to the creation and dissemination of copyrighted works, and the public adoption of that technology, exploded in the second half of the 20th Century. Advancement in that period outstripped all prior advances combined since Gutenberg invented the printing press. As the Senate Committee on the Judiciary Report states, these advances have greatly increased the commercial life of many works of authorship. *See* S. Rep. No. 104-315, at 12 (1996). Thus, the extensions over the last 40 years or so do not indicate an improper motive in Congress. Rather, they indicate that Congress has responded appropriately to enormously important changes in technology, and to changing international norms. *Cf. Sony Corp. v. Universal City Studios*, 464 U.S. 417, 430-31 (1984) ("Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.")

B. The CTEA Meets Any Requirement That Congress Promote Progress When It Sets Copyright Terms

This Court has held that copyright "is intended to motivate the creative activity of authors and inventors," and is not "primarily designed to provide a special private benefit." *Sony*, 464 U.S. at 429. But the Court has never held copyright legislation unconstitutional on this ground, and it should not do so here.

Petitioners essentially argue that the application of any new or extended right under copyright to any then existing work can be deemed to promote progress only if it provides an incentive to create that specific work. That, of course, is a logical impossibility, and one by which the First Congress obviously did not feel bound. As the first Copyright Act

amply demonstrates, Congress can have a number of reasons, all consistent with the promotion of progress, for broadly extending the term of copyrights for both new and existing works. The Constitutional text does not restrict the purpose of copyright protection to providing "incentives," but speaks more broadly of promoting progress.

1. The CTEA Promotes Progress by Providing Authors the Continuing Benefit of Their Copyright Bargain

Changes in technology or other circumstances may alter some of society's fundamental assumptions regarding the value and commercial longevity of works of authorship. Because those assumptions necessarily underlie the constitutional bargain between authors and the public, Congress has reasonably concluded that authors will be better motivated to create works of authorship if they believe the copyright law will respond appropriately to those changes as they affect existing copyrights. Indeed, this was one of the primary goals of the CTEA.

Congress found that "[t]echnological developments clearly have extended the commercial life of copyrighted works." S. Rep. No. 104-315, at 12 (1996). Congress further found that "[s]ince 1976, the likelihood that a work will remain highly profitable beyond the current term of copyright protection has increased significantly as the rate of technological advancement in communications and electronic media has continued to accelerate. . . ." *Id.* In particular, Congress highlighted "the advent of digital media and the explosive growth of the National Information Infrastructure (NII) and the Global Information Infrastructure (GII)." *Id.*

2. Extending the Term of Subsisting Copyrights Will Enhance the Competitiveness of American Copyright Holders

Congress had additional, valid reasons to conclude that extending the term of existing copyrights would promote progress. In "1993, the European Union issued a directive requiring all members to adopt a copyright term of life of the author plus 70 years." S. Rep. No. 104-315, at 4 (1996). It also required all member states to apply the "rule of the shorter term," under which each member state is required to protect foreign works only for the shorter of the term of protection in the foreign country or the term of protection in the member country. *Id.* at 4. As a result, so long as the United States retained a life of the author plus 50 years copyright term, American works would be protected in Europe for a period twenty years shorter than the term of protection for European works. Of course, Americans then also would have received royalties in Europe for twenty fewer years than their European counterparts. *Id.* at 7. ("Failure on the part of the United States to provide equal protection for works in the United States will result in a loss for American creators and the economy of the benefits of 20 years of international copyright protection that they might otherwise have.") It also meant that American works at or near the end of their copyrights might be less likely than their European counterparts, with twenty additional years of protection, to be exploited in new media.

If the CTEA had extended the term of only new copyrights, then the benefits described above for holders of American copyrights would have been delayed for the better part of a century. By applying the CTEA to all works currently protected, those benefits accrued immediately. Over the past

several decades, Congress has endeavored to enhance the success and productivity of American creators of copyrighted intellectual property through adherence to the Berne Convention and other efforts to obtain strong intellectual property protection for American works of authorship throughout the world. It has apparently succeeded.

> America exports more copyrighted intellectual property than any country in the world. . . . In fact, intellectual property is our second largest export, with U.S. copyright industries accounting for roughly $40 billion in foreign sales in 1994. For nearly a decade, U.S. copyright industries have grown at twice the rate of the overall economy. And, according to 1993 estimates, copyright industries account for some 5.7 percent of the total gross domestic product. Furthermore, copyright industries are creating American jobs at twice the rate of other industries, with the number of U.S. workers employed by core copyright industries more than doubling between 1977 and 1993. Today, these core copyright industries contribute more to the economy and employ more workers than any single manufacturing sector, accounting for more than 5 percent of the total U.S. workforce.
>
> Largely, the stellar performance of U.S. copyright industries is the result of strong intellectual property protection.

S. Rep. No. 104-315, at 9-10 (emphasis added).

A recent study commissioned by the International Intellectual Property Alliance, *Copyright Industries in the U.S. Economy: The 2002 Report* (2000), indicates an ever greater economic role of the copyright industries in the larger economy.

Thus, the CTEA's extension of the term of copyright for *all* works, including existing works, is a natural continuation of Congress' efforts to adapt United States copyright law as necessary to help ensure that an ever increasing number of Americans are actively and successfully involved in "the creative activity of authors and inventors," *Sony*, 464 U.S. at 429, 104 S. Ct. at 782.

3. The CTEA Further Promotes Progress by Harmonizing U.S. and International Copyright Law

Beginning with the 1976 amendments to the copyright law, which provided for protection for the life of the author plus 50 years, in line with then-current international standards, and continuing with the 1989 Berne implementation act, Congress has endeavored to harmonize U.S. copyright law with international copyright standards. The CTEA is an extension of those efforts, harmonizing U.S. copyright law with the emerging international standard to protect works for the life of the author plus 70 years.

Petitioners discount Congress' efforts to promote greater harmonization in two ways. First, they argue that promoting "harmonization" does not promote "Progress." Pet'r Br. at 22-23. As Congress concluded, however, "[u]niformity of copyright laws is enormously important to facilitate the free flow of copyrighted works between markets and to ensure

the greatest possible exploitation of the commercial value of these works in world markets. . . ." S. Rep. No. 104-315, at 8. Pursuing increased efficiency and trade through harmonization of laws affecting commerce is, of course, a common practice. By promoting growth in the industries that produce works of authorship, harmonization helps to "motivate the creative activity of authors and inventors," *Sony*, 464 U.S. at 429, 104 S. Ct. at 782. Thus, it "promotes the Progress of Science" in exactly the way contemplated in the Constitution.

Second, Petitioners argue that the CTEA does not really promote harmonization, because only a minority of countries have adopted the life plus 70 rule, and because other elements of the CTEA allegedly may make U.S. law less rather than more consistent with international copyright rules in some ways. Pet'r Br. at 44. Congress could reasonably conclude that the countries that have adopted the life plus 70 rule — those of the European Union — are more important trading partners than the countries that have not adopted that rule. Merely comparing the number of countries that have adopted the rule to the number of countries that have not gives very little useful information about the value of the rule to U.S. citizens. Furthermore, Congress believes that the life plus 70 rule will soon become the standard outside of Europe as well. S. Rep. No. 104-315, at 8 (quoting Statement of Marybeth Peters, Register of Copyrights and Associate Librarian of Congress for Copyright Services that "[I]t does appear that at some point in the future the standard will be life plus 70.")

4. The CTEA Promotes Progress by Encouraging the Preservation, Dissemination, and Exploitation of Valuable Older Works

Congress found that "the 20-year extension of copyright protection will . . . creat[e] incentives to preserve existing works." S. Rep. No. 104-315, at 13. The legislative history of the CTEA indicates that Congress was expressly concerned with "work contained in perishable media, such as records, film, audiotape, paper or canvas." *Id.* Congress found that copies of such works were at risk for "significant degradation of quality," a risk that could be alleviated by digital preservation of perishable media works, provided that someone was willing to pay the relatively high cost of transferring older works into a digital format. *Id.* Congress reasonably concluded that a longer copyright term would create an incentive to preserve older works by increasing the amount of time available to an investor to recover the investment and profit from the work. Such preservation of valuable older works plainly serves to promote progress, even though the works themselves were created long ago.

Petitioners admit that the CTEA may promote the preservation of works that continue to have commercial value, and their argument that it will discourage preservation by libraries or other organizations of a much larger number of works which are no longer generating royalties and for which the copyright owners can no longer be found is a *non sequitur*. Pet'r Br. at 45. That is essentially a legislative policy judgment.

Finally, extending the term of existing copyrights makes it easier for copyright holders, and other creators, to pursue opportunities to further develop, disseminate, and exploit

existing works. Many of these opportunities require large investments to realize. For example, to develop a novel or a popular character into a motion picture, create related interactive games and Internet sites, or create merchandising opportunities may require up-front expenditures of tens or even hundreds of millions of dollars. Because of the size of the required investment, film-makers and others who work with copyrighted material, if basing a motion picture or other major work on a pre-existing work of authorship, may prefer to license exclusive rights to a protected work than to use a public domain work. The reason is that using a protected work reduces the risk that another film maker would dilute interest in the motion picture by creating a similar motion picture. In this way, too, extending the term of existing copyrights promotes progress by "motivat[ing] the creative activity of authors and inventors," *Sony*, 464 U.S. at 429, and thus is a constitutional exercise of legislative power.

C. There Is No Applicable "Congruence and Proportionality" Test

Petitioners propose that this Court remand the case for a determination whether the government can prove that CTEA's extensions of copyright terms are "'congruent and proportional' to proper Copyright Clause ends." Pet'r Br. at 31. There is no sound basis for their suggestion. Subjecting Congress' policy decisions to such scrutiny (1) has no support in the Constitution or the cases decided thereunder; (2) is unworkable because it offers this Court no justiciable standards, and (3) would burden, rather than promote, progress. *Cf. Sony*, 464 U.S. at 431 (finding that Congress "has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by . . . new technology [that affects copyrighted works].")

1. The Court's Fourteenth Amendment Cases Do Not Support Applying a "Congruence and Proportionality" Standard to Extensions of Existing Copyright Terms

Petitioners cite *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) for the proposition "that 'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end' for legislation passed pursuant to § 5 of the 14th Amendment." Pet'r Br. at 31. They then suggest that the "the same structure can guide the Court in enforcing the limits of the Copyright Clause," and ask the Court to remand the case for an evaluation of the CTEA under this test. Pet'r Br. at 31-32.

In applying the "congruence and proportionality" standard of review to Congress' exercise of authority under Section 5 of the Fourteenth Amendment, however, the Court has noted that Congress' authority under Section 5 is "remedial," not "plenary." *City of Boerne*, 521 U.S. at 519-29. Unlike Congress' power under the Fourteenth Amendment, Congress' power under the Copyright Clause, like its power under the Commerce Clause and other Article I powers, is "plenary," not merely "remedial." Congress has the ultimate and sole authority to legislate regarding copyrights. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964); *see also* 17 U.S.C. § 301. Although the Constitution requires that grants of copyright be for "limited Times," it does not require that such grants be for the shortest time necessary to achieve certain goals. Applying a "congruence and proportionality" test for any enactments

under the Copyright Clause or any other Article I power would unconstitutionally usurp Congress's plenary authority to implement the Copyright Clause.

2. No Judicially Manageable Standards Exist to Guide a Congruence and Proportionality Test of Copyright Extensions

Unlike the Fourteenth Amendment context, applying a "congruence and proportionality" test here would enmesh the Court in policy judgments about the appropriate length of copyright term extensions that are uniquely the province of Congress to resolve. Petitioners themselves concede that this Court has no judicially manageable basis for resolving such questions. "Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court." Pet'r Br. at 14.

3. The Uncertain Application of a Congruence and Proportionality Test Would Retard Rather Than Promote Progress

A congruence and proportionality test would undermine the fundamental purpose for which the Constitution granted Congress authority to establish copyright protection. The judicial scrutiny that petitioners would require of each alteration of existing copyright protection would generate substantial uncertainty in the marketplace for works of authorship. As a result, such extensions will be less effective in motivating additional creative activity, thus undermining the public's ability to benefit from the bargain contemplated in the Copyright Clause.

Any time Congress attempted to extend the term of copyright, the market would likely perceive substantial uncertainty regarding whether works affected by the extension are protected until the extension is blessed by this Court. This Court has recognized the importance of "enhancing predictability and certainty of copyright ownership" when it rejected a proposed interpretation of "work for hire" in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749-50 (1989):

> Finally, petitioners' construction of the work for hire provisions would impede Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership. In a 'copyright marketplace,' the parties negotiate with an expectation that one of them will own the copyright in the completed work. With that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights.

III. The Decision Below Correctly Held That The CTEA Does Not Violate The First Amendment

The narrow holding below is no blanket repudiation of First Amendment principles in the field of copyright. Petitioners' suggested intermediate First Amendment scrutiny would add nothing to the analysis Petitioners already ask this Court to undertake in their challenge to Congressional power under the Copyright Clause.

A. The Copyright Act Is Not in Tension with the First Amendment

Petitioners assert a facial challenge to the CTEA under the Free Speech and Free Press Clauses of First Amendment. Pet'r Br. at 7-8. When evaluating such an attack on an act of Congress, this Court must "proceed with caution and restraint," upholding the enactment unless it is "not readily subject to a narrowing construction . . . *and* its deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. City of Jacksonville, Fla.*, 422 U.S. 205, 216 (1975) (voiding local ordinance concerning depictions of nudity on drive-in movie screens) (emphasis added).

Here, neither condition is satisfied. The CTEA is by definition subject to two significant, speech-protective narrowing constructions generally applicable to the Copyright Act, the fair use doctrine (§ 107) and the idea/expression distinction (§ 102(b)). In addition, the CTEA poses no real or substantial threat of abridging legitimate speech rights because it merely extends the term of authors' existing protections, which themselves raise no Constitutional concerns.

1. The CTEA Poses No Cognizable Threat to Legitimate Speech Interests

The extension of a work's copyright term does not raise First Amendment concerns. If the work has been made available to the public by the author, the public right to engage with it in the marketplace of ideas is not abridged. The First Amendment does not guarantee that every citizen, or even every library, will be able to afford every work

See, e.g., Hearst Corp. v. Stark, 639 F. Supp. 970, 975-976 (N.D. Cal. 1986).[18]

The Court below properly held, without dissent, that the Petitioners "lack any cognizable First Amendment right to exploit the copyrighted works of others." 239 F.3d at 376. In so holding the Court did not declare the Copyright Act beyond the scope of First Amendment review, but merely repeated the well-settled rule that the Act itself, through the idea/expression dichotomy in § 102(b) and the fair use doctrine in § 107, already embodies "adequate protection to free expression." *Id.* (quoting *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989)). A*ccord Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1984) (rejecting First Amendment defense "in view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use").

In refusing to recognize a free-standing First Amendment defense to copyright infringement, this Court in *Harper & Row* simply applied the analogous reasoning of its libel decision earlier the same year in *Calder v. Jones*, 465 U.S. 783 (1984). Writing for a unanimous Court, (now Chief)

18. In analogous cases, this Court has held that the purely economic consequences which legislation may have on speech do not raise First Amendment concerns. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 476 (1997) (doubts concerning legislative policy judgments do not justify reliance on the First Amendment as a basis for reviewing economic regulations); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (First Amendment inquiry is not concerned with economic impact, only with the effect on freedom of expression).

Justice Rehnquist held in *Calder* that where the substantive law governing potentially speech-restrictive litigation itself embodies First Amendment protections, the Court need not conduct any First Amendment analysis of the jurisdictional statute on which the action was premised.

As with the libel law in *Calder*, and as recognized in *Harper & Row*, here the substantive law of copyright provides adequate protection for First Amendment interests, by precluding protection for ideas and permitting fair use of protected expression. Because these narrowing constructions are built into the Copyright Act itself, at sections 102(b) and 107, they preserve First Amendment interests during the entire duration of every copyright, rendering the term of protection irrelevant to those concerns.

2. Petitioners' Proposed First Amendment Analysis of the CTEA Would Be Redundant

Once the Court determines that Congress permissibly enacted a life-plus-70 term pursuant to the Copyright Clause, then it necessarily determines that any speech "restriction" imposed by the CTEA (1) serves an important governmental interest, *i.e.*, promoting progress, and (2) is necessary to that end. Accordingly, the level of free speech scrutiny proposed by Petitioners is, in application, no higher than the necessary and proper review to which all acts of Congress are subject.

3. The CTEA Is Not Overly Broad

If the CTEA extends copyright terms for many works as to which no incentive purpose will be served, as Petitioners assert, it is not distinguishable in this respect from any other U.S. copyright statute ever written, including the Act of 1790. That Act, and every successor thereto, protected all original writings in particular categories, *e.g.*, "maps," without in any way suggesting that the validity of a given copyright could depend on the incentives that motivated a particular mapmaker. With this argument, Petitioners are in fact urging this court to adopt a "least speech-restrictive means" standard which they themselves recognize to be improper, Pet'r Br. at 45, and in the process they unjustly fault Congress for rightly declining to engage in Constitutionally dubious work-by-work discrimination.

CONCLUSION

As demonstrated above, Petitioners' facial challenge to the constitutionality of the CTEA is without sound basis. Accordingly, *Amicus* AIPLA respectfully urges this Court to reject Petitioners' challenge and affirm the decision of the Court of Appeals.

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

—v.—

JOHN D. ASHCROFT, in His Official Capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL COALITION FOR COPYRIGHT PROTECTION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

With the written consent of all parties, reflected in letters on file with the Clerk, the International Coalition for Copyright Protection (ICCP) submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of this Court.[1]

The ICCP is an organization formed by authors, illustrators, artists, songwriters and publishers for the protection of copyrights. All of its members depend upon copyright protection to exercise some legal control over the use of their creative work and to ensure that they receive adequate compensation when that work is published or performed. Many of its members depend upon copyright protection in the European Union, the extent of which depends upon the degree of protection afforded under United States law.

Members of the ICCP include Algis Budrys, Kevin J. Anderson, Rebecca Moesta, Will Eisner, Leo Dillon, Diane Dillon, Brad Lineweaver, Lydia Van Vogt, Vincent DiFate, Judith Holman, Kevin Holman, K.D. Wentworth, William J. Widder, Dateline Communications, Laura Freas, Frank Kelly Freas, Frank Frazetta, Scott E. Sutton, Susan Sutton, Author Services, Inc., Hollywood Writer's Society, Neil Gaiman, Gregory Benford, H.R. Van Dongen, Nina Kiriki Hoffman, Edd Cartier, Dean Cartier, Georgina Cartier, Joseph Wrzos, Helen de la Ree, and Artist Space.

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[1] No counsel for a party authored the brief in whole or in part, and no person or entity, other than the amicus curiae or its members, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (1998), is a valid exercise of Congress' plenary power to regulate commerce with foreign nations and, independently, of Congress' Copyright Clause authority. *See* U.S. Const., art. I, § 8, cl. 3; *Id.* at cl. 8. Because the government persuasively argues that the statute is authorized by the Copyright Clause, this brief focuses on a separate source of legislative power that adequately supports the CTEA: the Foreign Commerce Clause.

As the statute's legislative history demonstrates, a central purpose of the CTEA is to regulate foreign traffic in copyrighted materials between the United States and member countries of the European Union. As a result of a Directive issued by the Council of European Communities, prior to the CTEA American copyright-owners were entitled to less copyright protection than European copyright-owners in overseas markets. By extending the copyright term for American works sold in Europe, the CTEA places Americans and Europeans on equal footing when competing for revenues within the European Union. One of the chief objectives of the statute is therefore to regulate foreign commerce by removing a competitive disadvantage faced by the American copyright industry when marketing its goods abroad.

As numerous decisions of the Court have established, Congress possesses sufficient authority to enact a statute so long as any grant of legislative power adequately supports the law. Accordingly, the fact that a particular congressional act exceeds the power granted by one constitutional provision is not fatal to the act, provided that an independent grant of power is sufficient. Thus, for example, trademark law is a valid exercise of the commerce power notwithstanding that it exceeds the author-

ity granted by Article I, § 8, cl. 8. Similarly, Congress may abrogate the States' Eleventh Amendment immunity when acting pursuant to Section 5 of the Fourteenth Amendment, but not when acting pursuant to the Commerce Clause or other Article I powers. Analogously, the CTEA would remain a valid exercise of the Foreign Commerce power even if the Court were to agree with petitioners that the law is not supported by the Copyright Clause.

The CTEA does not warrant heightened First Amendment scrutiny. As the Court has already made clear, copyright law leaves ample breathing room for the First Amendment by incorporating free speech protections such as the idea/expression dichotomy and the fair use doctrine. There is no significant First Amendment interest relating specifically to copyright duration, such that extending the term of copyright protection should trigger heightened First Amendment scrutiny. In any event, the CTEA furthers the substantial governmental purpose of eliminating unfair treatment of the American copyright industry abroad, and burdens no more speech than is necessary to accomplish that goal, so the statute survives even the scrutiny that petitioners urge the Court to apply.

ARGUMENT

I. THE CTEA IS A VALID EXERCISE OF CONGRESS' POWER TO REGULATE COMMERCE WITH FOREIGN NATIONS

Petitioners' arguments in this Court and the courts below consistently presume that the only grant of congressional power in the Constitution that could authorize the CTEA's extension of copyright protection is the Copyright Clause in combination with the Necessary and Proper Clause. *See* U.S. Const., art. I, § 8, cl. 8; *Id.* art.

I, § 8, cl. 18. The presumption is incorrect.[2] As the statute's legislative history makes clear, the CTEA was enacted in order to adjust trade relations between the United States and other nations with regard to copyrighted materials. *See* S. Rep. No. 104-315, at 3 (1996) ("The *purpose* of the bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works.") (emphasis added).[3] Indeed, Congress found that absent

[2] *Amicus* ICCP fully agrees with the government's position that the CTEA is authorized by the Copyright Clause, and nothing in this brief is intended to suggest otherwise. Rather, the arguments below demonstrate that irrespective of whether the copyright power supports the CTEA, the statute is adequately supported by the foreign commerce power.

[3] *See also* S. Rep. No. 104-315, at 5 ("In order *to safeguard the Nation's economic interests* and those of America's creators in the *protection of copyrighted works abroad*, Senator Hatch, Senator Feinstein and Senator Thompson introduced the Copyright Term Extension Act . . . .") (emphasis added); 144 Cong. Rec. S.12377-01, S12377 (Statement of Senator Hatch) ("The *main purpose* of the [CTEA] is to ensure adequate copyright *protection for American works abroad* by extending the U.S. term of copyright protection for an additional 20 years.") (emphasis added). The Executive Branch similarly pointed to the anticipated effect on foreign commerce when explaining the Executive's support of the CTEA. *See The Copyright Term Extension Act of 1995: Hearing Before the Senate Committee on the Judiciary*, S. Hrg. 104-817, 104th Cong. 1st Sess. (Sept. 20, 1995) (Statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks) ("[T]here are several reasons that a copyright term increase may be warranted. *Most notably*, the bill would provide U.S. copyright owners benefits in other countries and in international fora. Accordingly, we support the twenty-year extension of copyright protection . . . .") (emphasis added); *id.* ("The *primary reason* for changing the copyright term by twenty years would be to bring U.S. law into conformity with that of the European Union.") (emphasis added); *id.* ("Extending the term of copyright protection by twenty years may also benefit the U.S. economy and, *in particular*, the U.S. trade balance.") (emphasis added).

the remedial measures effected by the CTEA, "[t]he United States stands to lose a significant part of its international trading advantage." *Id.* at 10. Properly viewed as a statute intended to maintain an existing trade surplus in America's second-largest export industry, and to counteract unfair treatment overseas of a sector of the American economy that employs more workers than any single manufacturing sector, the CTEA is a valid exercise of Congress' power "to regulate commerce with foreign nations." U.S. Const., art. I, § 8, cl. 3.[4]

A. The Foreign Commerce Purpose and Effect of the CTEA

To understand how the CTEA affects foreign commerce, and thus to discern Congress' purposes in enacting the statute, it is first necessary to understand the European Union's "rule of the shorter term" for copyrights. Prior to the CTEA, the term of copyright protection in the United States for most works was lifetime of the author plus 50 years, the minimum period necessary to comply with the Berne Convention[5] and the Trade-Related Aspects of Intellectual Property ("TRIPS") Agreement.[6] In 1993, the Council of the European Com-

[4] That Congress did not expressly cite the Foreign Commerce Clause as authorization for the CTEA does not prevent the Court from upholding the statute under that Constitutional provision. " '[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.' " *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983), *superseded by stat. on other grounds* (quoting *Woods v. Miller Co.*, 333 U.S. 138, 144 (1948)).

[5] *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, art. 7, 828 U.N.T.S. 221.

[6] *See* TRIPS, art. 9(1), reprinted in 33 Intl. Legal Mat. 1197, 1201.

munities issued a Directive ("EU Directive") requiring member states to harmonize their copyright laws by setting the period of copyright protection at lifetime of the author plus seventy years—*i.e.*, twenty years longer than the copyright period in the United States. *See* Council Directive 93/98, 1993 O.J. (L 290/9), art. 1.[7] The EU Directive also mandates implementation of the "rule of the shorter term," under which works originating in non-member nations, such as the United States, will receive copyright protection for no longer than the term of copyright in the country of origin. *Id.* at art. 7. The upshot is that under the EU Directive creative works from the United States would be eligible for less copyright protection than works from the European Union.

The CTEA remedies this imbalance. By extending American copyrights for twenty years, the statute allows American works to receive copyright protection in the European Union for a term of lifetime of the author plus seventy years, the same period available for European works. The CTEA thus maximizes the potential economic returns from exploitation of American creative works abroad, and eliminates a disadvantage that the American copyright industry would otherwise suffer when competing with European industries for revenues within the European Union.[8] The CTEA, then, is protective economic legislation directed at international commerce, and is therefore akin to statutes imposing tariffs or customs duties, or any law intended to strengthen the hand of American industries against foreign competition.[9]

[7] "According to the Copyright Office, all the states of the European Union have now brought their laws in compliance with the directive. And, as the Register of Copyrights has stated, those countries that are seeking to join the European Union, including Poland, Hungary, Turkey, the Czech Republic, and Bulgaria, are likely, as well, to amend their copyright laws to conform with the life-plus-70 standard." 144 Cong. Rec. S12377-01, S12378 (October 12, 1998) (Statement of Senator Hatch).

[8] The fact that the CTEA increases the duration of copyrights for "works made for hire," generally owned by corporations, to ninety-five years from seventy-five years, while the analogous protection in the European Union lasts for only seventy years, does not undercut this rationale for the Act. As the Senate Report explains, corporate works in the European Union often receive protection for the life of some individual plus seventy years, where those same works in the United States would be deemed works made for hire, and would therefore receive copyright protection for a shorter period:

> [W]ith few exceptions, the countries of the European Union do not recognize the work-made-for-hire doctrine. The closest corollary is the European doctrine of "collective works or works created by a legal person," which generally affords protection for 70 years from the date a work is made publicly available . . . However, in many, if not most cases, this category does not include works that U.S. law protects as works made for hire. For example, in Germany, which has implemented the EU Directive and which does not recognize the work-made-for-hire doctrine, the basic term of life-plus-70 applies to newspaper, magazine, and journal articles where the author is identified, regardless of whether the article was prepared in the scope of the author's employment. Similar protection is applied to books and musical works. Where these works are prepared as works made for hire, they are protected in the United States for the shorter of 75 years from publication or 100 years from creation. In many such cases, the European life-plus-70 term would provide greater protection than the fixed 75-year term in the United States. Thus, the application of the rule of the shorter term will result in less protection for these works in the countries of the European Union than they might otherwise have.

S. Rep. No. 104-315, at 15-16 (internal citations omitted).

[9] In addition, the CTEA furthers the foreign policy goal of harmonizing United States copyright law with the laws of important trading partners. During legislative hearings on the CTEA, Congress heard testimony from the Register of Copyrights that "[t]he Copyright

As such, the CTEA is plainly a necessary and proper exercise of Congress' foreign commerce power. "The plenary authority of Congress to regulate foreign commerce . . . is well established." *California Bankers Assoc. v. Shultz*, 416 U.S. 21, 59 (1974). "Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan-Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 448 (1979). International traffic in copyrighted materials is no less subject to Congress' Foreign Commerce Clause authority than international traffic in any commodity. *See Bd. of Trustees of University of Illinois v. U.S.*, 289 U.S. 48, 56 (1933) (The Foreign Commerce Clause " 'comprehend[s] every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.' ") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

Congress' plenary authority to regulate international commercial activity would be of little value if it could not be used to protect American individuals and industries from threats by foreign competitors. Drawing from extensive testimony before the Senate Committee on the Judiciary, the Senate Report on the CTEA clearly sets out the threat to which the statute responds, as well as the importance of the goal accomplished by the CTEA to the national economy:

Office believes harmonization of the world's copyright laws is imperative if there is to be an orderly exploitation of copyrighted works." *The Copyright Term Extension Act of 1995: Hearing Before the Senate Committee on the Judiciary*, S. Hrg. 104-817, 104th Cong. 1st Sess. (Sept. 20, 1995) (Statement of Marybeth Peters, Register of Copyrights and Associate Librarian of Congress for Copyright Services).

America exports more copyrighted intellectual property than any country in the world, a huge percentage of it to nations of the European Union. In fact, intellectual property is our second largest export, with U.S. copyright industries accounting for roughly $40 billion in foreign sales in 1994. For nearly a decade, U.S. copyright industries have grown at twice the rate of the overall economy. And, according to 1993 estimates, copyright industries account for some 5.7 percent of the total gross domestic product. Furthermore, copyright industries are creating American jobs at twice the rate of other industries, with the number of U.S. workers employed by core copyright industries more than doubling between 1977 and 1993. Today, these core copyright industries contribute more to the economy and employ more workers than any single manufacturing sector, accounting for more than 5 percent of the total U.S. workforce.

. . . . *The United States stands to lose a significant part of its international trading advantage if our copyright laws do not keep pace with emerging international standards*. Given the mandated application of the "rule of the shorter term" under the EU Directive, American works will fall into the public domain 20 years before those of our European trading partners, undercutting our international trading position and depriving copyright owners of two decades of income they might otherwise have. . . . [The CTEA] will ensure fair compensation for the American creators whose efforts fuel the intellectual property sector of our economy by allowing American copyright owners to benefit to the fullest extent from foreign uses and will, at the same time, ensure that our trading partners do not get a free ride from their use of our intellectual property.

S. Rep. No. 104-315, at 9-10 (internal footnotes omitted) (emphasis added).

B. The CTEA Reaches No Further Than Is Necessary to Achieve Congress' Foreign Commerce Objectives

The mere fact that in addressing this threat Congress modified the term of United States copyright protection does not place the CTEA outside the scope of the Foreign Commerce Clause, such that the statute could be authorized only by the Copyright Clause. As a preliminary matter, the CTEA's effect on domestic copyrights is no reason to doubt that the statute's primary purpose is, as stated in the Senate Report, "to safeguard the Nation's economic interests and those of America's creators in the protection of copyrighted works abroad." S. Rep. No. 104-315, at 5. Because the rule of the shorter term makes copyright protection in EU countries dependent on protection in the copyright holder's country of origin, Congress could not have leveled the playing field overseas without extending the copyright period in the United States. Nor could Congress practicably have increased the term of protection only for those works actually exploited in an EU member country, as this would result in inconsistent protection amongst similar works within the United States, presenting serious administrative difficulties, and would encourage copyright holders to arrange otherwise nonproductive European uses in order to secure twenty additional years of protection. In short, the domestic impact of the CTEA is an essential incident to the statute's substantial and legitimate goal of protecting American industries engaged in foreign commerce. The statute is therefore a necessary and proper exercise of a power entrusted to Congress. *See* U.S. Const., art. I, § 8, cl. 18.

Also essential if the CTEA is to achieve its intended foreign commerce objective is the statute's application to subsisting copyrights, or "retroactive application" in petitioners' terminology.[10] Limiting the term extension to prospective copyrights would have meant that the rule of the shorter term would continue to provide EU works with a competitive advantage over American works sold in the EU for at least fifty years, and in most cases significantly longer. Such deferred implementation could hardly be deemed responsive to a present threat to a vital sector of the United States economy. Where, as here, Congress has made an informed and considered judgment that immediate legislative action is necessary to protect American interests in foreign affairs and commerce, it is not the role of the Court to impose a different policy.

C. In Appropriate Circumstances the Foreign Commerce Clause May Support Legislation That Exceeds the Limitations of Another Grant of Authority

Upholding the CTEA under the Foreign Commerce Clause would be fully consistent with the Court's jurisprudence regarding use of the Commerce Clause to support legislation affecting matters potentially within

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[10] Petitioners assert that "[t]his Court has never decided whether Congress has the power, consistent with the 'limited Times' requirement, to extend the terms of existing copyrights." Pet. Op. Br. at 17. But the Court has determined that Article I, § 8, cl.8 permits retroactive amendments to patent law. *See McClurg v. Kingsland*, 42 U.S. 202, 206 (1843) ("[T]hough [changes to the patent law] may be retrospective in their operation, that is not a sound objection to their validity; the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints on its exercise, there can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents.").

the purview of other grants of congressional authority. As a general matter, a regulation arguably permissible under two grants of congressional power may be authorized by one of those grants even if not authorized by the other, and even if the constitutional provision found to contain sufficient authority for the law is not the one on which Congress had intended to rely. Thus, after determining that a nineteenth-century criminal trademark statute was not within Congress' Copyright Clause authority—the power, the Court inferred, that Congress had intended to exercise in enacting the statute—the Court went on to consider whether regulation of trademarks was permissible under the Commerce Clause. *See The Trade-Mark Cases*, 100 U.S. 82, 93-94 (1879). Although the Court invalidated the statute under the then-prevailing understanding of Congress' commerce power, modern trademark protection, though presumably still unsupported by the Copyright Clause, "is built entirely on the Commerce Clause." *United States v. Moghadam*, 175 F.3d 1269, 1278 (11th Cir. 1999).

Another decision of the Court demonstrating that the commerce power may authorize legislation that narrowly exceeds a different grant of authority in Article I, § 8 is *Bd. of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48 (1933). In *Bd. of Trustees*, the Court considered the University of Illinois' contention that it should be exempt from paying customs duties when importing goods in furtherance of its educational mission. Such duties, the University argued, are taxes, and therefore unconstitutional if levied against state instrumentalities, such as the University, for the performance of governmental functions. *See id.* at 57-58. Rejecting the University's argument, the Court explained: "It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. It is also true that the taxing power embraces the power to lay duties. But

because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate [foreign] commerce." *Id.* at 58 (internal citations omitted).

The lower courts as well have recognized that in appropriate circumstances the Commerce Clause may authorize legislation where other Article I powers would not suffice. In *The Authors League of America, Inc. v. Oman*, 790 F.2d 220 (2d Cir. 1986), for example, the Second Circuit considered a constitutional challenge to the so-called "manufacturing clause," a now defunct provision that denied full copyright protection to English-language non-dramatic literary materials manufactured outside of the United States or Canada. *See id.* at 221; 17 U.S.C. § 601 (1985). Congress' objective in so limiting the scope of copyright protection, the court explained, was "to protect domestic labor and manufacturers in the printing and publishing industry. This legislation seeks to encourage the use of American printers . . . ." *Id.* Like petitioners in the instant case, plaintiffs in *Authors League* argued that the challenged provision was beyond Congress' Copyright Clause authority because the statute had only a tenuous connection to the promotion of progress in science. *See id.* at 224. Rejecting the challenge, the court explained: "What plaintiffs' argument fails to acknowledge . . . is that the copyright clause is not the only constitutional source of congressional power that could justify the manufacturing clause. In our view, denial of copyright protection to certain foreign-manufactured works is clearly justified as an exercise of the legislature's power to regulate commerce with foreign nations." *Id*; *see also Moghadam*, 175 F.3d at 1280 ("[I]n some circumstances the Commerce Clause may indeed be used to accomplish that which may not have been permissible under the Copyright Clause."); 3 Melville

B. Nimmer & David Nimmer, *Nimmer on Copyright* § 9A.07[B], at 9A-80-81 (arguing that legislation affecting copyrights may adequately be supported by Congress' power to implement treaties and to regulate commerce, even if not supported by the Copyright Clause).[11]

The Court need not determine that the CTEA exceeds the Copyright Clause in order to find that the statute is authorized by the Foreign Commerce Clause, as the commerce power may overlap with other grants of authority. This is evident from *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), in which the Court looked to the Commerce Clause to uphold the Civil Rights Act of 1964 against constitutional challenge. While the government had sought support for the statute under Section 5 of the Fourteenth Amendment as well, the Court declined to reach that issue, noting that since "Congress possessed ample power [under the Commerce Clause] we have . . . not considered the other grounds relied upon [by the government]." *Id.* at 250. The Court went on to observe that its reliance on the Commerce Clause to uphold the Civil Rights Act in no way undercut the possibility that the statute was also within Congress' Section 5 authority. *See id.* ("This is not to say that [Section 5] was not adequate . . . ."); *cf. id.* at 280 (Douglas, J., concurring) ("I would prefer to

[11] To the same effect is *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (Whyte, J.), upholding the Digital Millennium Copyright Act ("DMCA"), Pub L. No. 105-304, which *inter alia* prohibits circumvention of digital anti-piracy controls and limits the copyright liability of Internet service providers who transmit copyrighted materials. The statute was enacted to implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. *See* S. Rep. 105-190 (1998), at 2. The defendant in *Elcom* moved to dismiss the indictment on the ground that the DMCA exceeds Congress' Copyright Clause authority. The court denied the motion, finding that Congress possessed sufficient authority to enact the law under the Commerce Clause. *See id.*, slip op. at 26-32.

rest on the assertion of legislative power contained in § 5 of the Fourteenth Amendment . . . ."); *see also Bd. of Trustees, supra.*

The Court employed a similar analysis almost twenty years later in *EEOC v. Wyoming*, 460 U.S. 226 (1983), which upheld an amendment to the Age Discrimination in Employment Act ("ADEA") extending the statute's protection to employees of state and local governments. After concluding that the challenged amendment "was a valid exercise of Congress's powers under the Commerce Clause," the Court observed that "[w]e need not decide whether it could also be upheld as an exercise of Congress's powers under § 5 of the Fourteenth Amendment." *Id.* at 243; *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (concluding that the ADEA is not appropriate section 5 legislation).

D. When Exercising Its Power Over Foreign Affairs, Congress May Enact Legislation That Would Be Impermissible in a Purely Domestic Context

The principle that the limitations on congressional power will vary according to which grant of power is exercised is particularly significant where, as here, Congress acts in the arena of international affairs, over which the political departments have plenary authority.[12]

[12] *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000) ("[T]he nuances of the foreign policy of the United States are much more the province of the Executive Branch and Congress than of this Court.") (internal quotations omitted); *Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating to the conduct of foreign relations are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (internal quotation omitted); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what

As the Court has made clear, a congressional act not authorized by the Constitution may later become authorized if the subject matter acted upon takes on an international dimension. Thus, in *Missouri v. Holland*, 252 U.S. 416 (1920), the Court upheld the Migratory Bird Treaty Act of 1918, notwithstanding that purely domestic legislation similarly prohibiting the killing of migratory birds within the United States had previously been invalidated. "It is obvious," the Court explained, "that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . . ." *Id.* at 433. Accordingly, "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432; *see also United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 125 (1973) ("Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers '(t)o regulate Commerce with foreign Nations.' ").

E. Upholding the CTEA Under the Foreign Commerce Clause Would Not Eradicate From the Constitution Any Limitation on Congressional Power

In *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982), the Court considered a statute giving employees of a recently insolvent railroad preferential

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may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *cf. Barclays Bank PLC v. Franchise Tax Bd. of Calif.*, 512 U.S. 298, 327-28 (1994) (Judiciary lacks authority to assess whether method of state taxation of multinational corporations presents undue threat of economic retaliation by foreign nations).

treatment in the disbursement of assets from the bankruptcy estate. Because the challenged statute by its plain terms affected only a single regional railroad, the Court struck down the law as unsupported by Congress' power to enact "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8, cl. 4 (emphasis added). The Court observed that bankruptcy laws, such as the law challenged, could not be enacted under the independent authority of the Commerce Clause, which contains no uniformity requirement. "[I]f we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause," the Court explained, "we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Id.* at 468-69.

Railway Labor Executives stands for the proposition that a grant of congressional authority will not be interpreted in a manner that renders a constraint on the exercise of a separate grant of authority inoperative in any and all circumstances—*i.e.*, a manner that "eradicate[s] from the Constitution a limitation on [Congress'] power." Accordingly, the Interstate Commerce Clause will not authorize bankruptcy legislation because, if it would, the uniformity requirement of the Bankruptcy Clause would never again restrain a congressional act. Put differently, the Commerce Clause will not be construed so that the term "uniform" in the Bankruptcy Clause becomes, in the parlance of statutory interpretation, mere surplusage.

In contrast, where one grant of power would allow Congress to enact legislation in excess of another grant, but the limitations of the latter would still be effective in other circumstances, Congress may rely on the grant that contains sufficient authority. Thus, although trademark law gives "exclusive rights" to "writings" in a manner

that exceeds the authority granted by Article I, § 8, cl. 8, *see The Trade-Mark Cases*, *supra*, protection of trademarks is nonetheless permissible under the modern interpretation of the commerce power. Similarly, while anti-discrimination statutes may be authorized by either the Commerce Clause or Section 5 of the Fourteenth Amendment, "when properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers." *EEOC v. Wyoming*, 460 U.S. at 243 n.18. Laws that concedely go beyond Congress' powers of taxation or regulation of interstate commerce may nevertheless be enacted when done in the context of foreign commerce or foreign relations. *See Bd. of Trustees*, *supra*; *Missouri v. Holland*, *supra*. In each of these examples, the fact that a congressional act exceeds the limitations of one grant of authority does not prevent the act from being authorized by a different grant.

So too with the CTEA. Even if it were true—and it is not—that the statute is unsupported by the Copyright Clause, the CTEA would nonetheless be a valid exercise of the foreign commerce power for, as the Court wrote of a different statute, "[t]he purpose to regulate foreign commerce permeates the entire congressional plan." *Bd. of Trustees*, 289 U.S. at 58; *cf. Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983). As noted, if not for the CTEA Congress could not have carried out its legitimate objective of placing the American copyright industry on equal footing with its competition in foreign markets. The CTEA is distinguishable from most other legislation affecting copyrights in that here the statute's domestic impact is a necessary incident to its "main purpose" of regulating foreign commerce. 144 Cong. Rec. S.12377-01, S12377. Upholding the CTEA under the Foreign Commerce Clause in these circumstances could not "eradicate from the Constitution" any constraint on

the copyright power, as ordinary copyright legislation would remain subject to the limitations contained in the Copyright Clause.

Finally, neither *Railway Labor Executives* nor any decision of the Court suggests that the limitations contained in the Copyright Clause operate as an affirmative prohibition on Congress regardless of what grant of authority Congress exercises. The provisions of Article I, § 8 of the Constitution, including the Copyright Clause, are limited grants of power. Each one authorizes Congress to take certain legislative actions, subject to the limitations of the particular grant of authority at issue. It is in the following section, Article I, § 9, and in the Bill of Rights and certain other Amendments that the Constitution lays down overarching prohibitions which Congress may not transgress no matter what power it exercises. *Railway Labor Executives* does nothing to alter this plain aspect of constitutional structure, recognized and relied upon in the cases discussed *supra* in Parts I.C and I.D.

II. THE COURT CAN AND SHOULD DECIDE WHETHER THE CTEA IS AUTHORIZED BY THE FOREIGN COMMERCE CLAUSE EVEN THOUGH THE QUESTION WAS NOT CONSIDERED BY THE CIRCUIT COURT OR EXPRESSLY PRESENTED IN THE PETITION FOR CERTIORARI

It is beyond dispute that the Court may, if it chooses, resolve the legal question whether Congress had sufficient authority under the Foreign Commerce Clause to enact the CTEA. As the Court has explained, "consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond [the Court's] power, and in appropriate circumstances [the Court] ha[s] addressed

them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980) (citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 66, 68-69 (1938); *Vachon v. New Hampshire*, 414 U.S. 478 (1974); *Moragne v. States Marine Lines*, 398 U.S. 375 (1970); *Silber v. United States*, 370 U.S. 717 (1962)).

Accordingly, in *Vance* the Court considered an issue not raised in the Court of Appeals and not presented in the certiorari petition after finding "some merit" in the government's contention that the "issue is an essential, or at least an advisable, predicate to an intelligent resolution of the constitutionality of" the challenged provision. *Vance*, 444 U.S. at 258 n.5; *see also Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990) (resting decision on an issue not raised in the lower courts and not argued by the parties but "ultimately dispositive of the present dispute"); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980) (deciding a state action question not presented to the Court of Appeals); *cf. McCleskey v. Zant*, 499 U.S. 467, 522-23 (1991) (Marshall, J., dissenting) (noting that the decision rested on the resolution of an issue not presented in the lower courts and evidently not anticipated by the parties).

Indeed, the Court has ample authority to decide even significant constitutional questions that have been raised only by *amicus curiae*. Thus, in *Teague v. Lane*, 489 U.S. 288, 300 (1989), the Court did not hesitate to adopt a new retroactivity standard, although "[t]he question of retroactivity . . . has been raised only in an *amicus* brief." Similarly, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court for the first time applied the exclusionary rule to the States, a course of action proposed only by *amicus curiae*. *See id.* at 646 n.3; *cf. Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or

claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

In the instant case, consideration of the Foreign Commerce Clause is essential to intelligent resolution of the questions presented. Petitioners urge the Court to invalidate a federal statute, partly on the ground that Congress lacked sufficient authority to enact it. Cases concerning the limits of constitutional grants of authority call for more flexibility regarding arguments not raised below than do cases in which a statute is challenged solely on the ground that, for example, it violates a provision of the Bill of Rights. This flexibility is necessary because the refusal to consider other potentially relevant grants of power may well produce an intolerable result: the invalidation of a federal statute that Congress had sufficient authority to enact. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

Moreover, as discussed below, recognition of the CTEA's foreign commerce purpose will become critical in the event the Court agrees with petitioners that the statute should be subjected to intermediate First Amendment scrutiny. No accurate analysis of the substantiality and legitimacy of the government's interests in enacting the CTEA, nor of whether the statute's burden on speech is essential to the advancement of those interests, may be undertaken without taking account of the statute's primary purpose of affecting foreign trade in copyrighted materials.

For these reasons, the Court should not invalidate the CTEA under either rationale asserted by petitioners without first giving full consideration to the applicability of the Foreign Commerce Clause and to the statute's intended effect on foreign commerce. If the Court finds that these matters are not adequately presented to permit such consideration, then the appropriate course of action would be to call for supplemental briefing or to remand to the Court of Appeals for further proceedings.

III. THE CTEA IS CONSISTENT WITH THE FIRST AMENDMENT

A. The Court of Appeals Correctly Concluded That Heightened First Amendment Scrutiny Is Not Applicable to a Statute Establishing Copyright Protection, and That the CTEA Does Not Unconstitutionally Abridge Freedom of Expression

Petitioners argue that the First Amendment imposes a discrete limit on the duration of copyright, and moreover, apparently a limit that is independent from the "limited times" requirement imposed by the Copyright Clause. Petitioners identify two injuries from term extension that allegedly implicate First Amendment rights and, petitioners argue, are not ameliorated by "the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by [the] fair use [doctrine]." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985). First, petitioners contend that "[t]he constitutional interest in the public domain is an interest in guaranteeing access not just to the author's ideas"—which may be exploited irrespective of copyright—"but also his expression."

Second, petitioners contend that the fair use doctrine inadequately protects would-be *commercial* exploiters of copyrighted expressions, while apparently conceding that fair use does vindicate the First Amendment interests of *noncommercial* actors. Pet. Op. Br. at 36.

The interests identified by petitioners are of no, or at best minor, First Amendment significance. For purposes of the First Amendment, what is critical is that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Except for purposes of criticism or parody—for which the fair use doctrine shields the speaker from copyright liability—little is added to public debate and the process of collective self-governance when *A* gains a right to *B*'s unique expressions,[13] particularly, as will generally be the case, when the expressions at issue have already been made available to the public. Similarly, *A*'s interest in deriving commercial profits from *B*'s creation is not one that raises concerns of governmental suppression of ideas or of free and open debate. Indeed, whose coffers are filled by commercial transactions involving speech is hardly a First Amendment issue at all. It is not, that is, a question of whether ideas and viewpoints will be available for public consideration; it is simply a question of who will be enriched when an author's creations generate commercial revenues.

The important fact for First Amendment purposes is that the exchange of ideas shall remain untrammelled by government action. It is significant, then, that the term extension effected by the CTEA will not prevent any idea from competing against others in the marketplace.

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[13] In those rare cases where an idea is inseparable from its form of expression, the so-called "merger doctrine" precludes copyright liability for exploitation of the relevant expressions. *See, e.g., Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 35-36 (1st Cir. 2001).

Indeed, the CTEA will not even prevent any *expression* from being distributed to the public—at least no expression that the author has seen fit to publish. Congress ensured as much by including in the CTEA a provision stating that during the last twenty years of the copyright of a published work—*i.e.*, during the period added by the CTEA—a library or archive "may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research," provided that the work is not "subject to normal commercial exploitation" or cannot "be obtained at a reasonable price." 17 U.S.C. § 108(h).

In sum, no separate and free-standing constraint on copyright duration is imposed by the First Amendment. This is not to say, of course, that copyright law never implicates First Amendment concerns, but only that the First Amendment issues that do arise have little to do with copyright duration. Indeed, the most pressing First Amendment question posed by copyright law is precisely the one resolved by the Court in *Harper & Row*: whether political speech concerning recent events not already available in the marketplace of ideas—speech undoubtedly residing at the core of the First Amendment—may be suppressed by an assertion of copyright. If, as *Harper & Row* soundly concluded, the idea/expression dichotomy, the prohibition against copyrighting facts, and the fair use doctrine are sufficient to vindicate First Amendment interests even as to core political speech subject to copyright restrictions, then it is unclear how a First Amendment violation could occur merely because the copyright in question lasts seventy years instead of fifty years from the author's death.

Significantly, none of the First Amendment protections in copyright law on which *Harper & Row* relied is

affected by the CTEA. Just as before, "no author may copyright facts or ideas." *Harper & Row*, 471 U.S. at 547; *see also* 17 U.S.C. § 102(b). Accordingly, the public traffic in ideas remains uninhibited by copyright law, and likewise "[t]he public interest in the free flow of information is [still] assured by the law's refusal to recognize a valid copyright in facts." *Harper & Row*, 471 U.S. at 558 (quoting *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 61 (2d Cir. 1980)). Also unchanged by the CTEA is the preexisting fair use doctrine, which "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (alteration in original) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)); *see also* 17 U.S.C. § 107. So after the CTEA, just as before it, "copyright is limited to those aspects of [a] work . . . that display the stamp of the author's originality," *Harper & Row*, 471 U.S. at 547, and copyright will be disregarded in any particular case if doing so would "serv[e] the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity." Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).

Accordingly, heightened First Amendment scrutiny is not appropriate to test the constitutionality of the CTEA.

B. The CTEA Satisfies the *O'Brien* Test

In any event, the CTEA is constitutional under the standard of intermediate scrutiny set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), which petitioners urge the Court to apply. As the Court recently explained:

> Under *O'Brien*, a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."
>
> To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

Turner Broadcasting System, Inc. v. FCC ("*Turner I*"), 512 U.S. 622, 662 (1994) (internal citation omitted) (quoting *O'Brien*, 391 U.S. at 377, and *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

1. The CTEA Serves Substantial Governmental Interests

As with their argument relating to the copyright power, petitioners' First Amendment challenge to the CTEA consistently presumes that the statute could be enacted pursuant only to Congress' Copyright Clause authority. Petitioners accordingly recognize only one legitimate and substantial governmental interest potentially advanced by the law: "providing incentives to authors to create original works." Pet. Op. Br. at 40. In fact, however, the primary purpose of the CTEA, as discussed above, is to preserve a favorable balance of trade in copyrighted materials between the United States and foreign nations. Needless to say, the government has a substantial interest in protecting United States industries vital to the nation's economic health when foreign legislation would otherwise create an uneven playing field.

This interest is separate from, and additional to, the substantial interest of harmonizing American copyright law with the laws of its important trading partners to the extent practicable. As explained by the Register of Copyright during legislative hearings on the CTEA, "[t]he Copyright Office believes harmonization of the world's copyright laws is imperative if there is to be an orderly exploitation of copyrighted works. . . . It does appear that at some point in the future the standard will be for life plus 70. The question is at what point does the United States move to this term?" *The Copyright Term Extension Act of 1995: Hearing Before the Senate Committee on the Judiciary*, S. Hrg. 104-817, 104th Cong. 1st Sess. (Sept. 20, 1995) (Statement of Marybeth Peters, Register of Copyright and Associate Librarian of Congress for Copyright Services).

Moreover, as the government persuasively argues, the CTEA's twenty-year term extension advances substantial domestic interests as well. Congress identified two means by which copyright extensions would ultimately result in a richer and more vibrant public domain, and therefore advance the interests protected by the Copyright Clause. *First*, Congress was concerned with the potential disappearance of older creative works stored on analog media subject to deterioration, such as film and audio tape. Converting these works into a digital format would allow them to survive, in principle, in perpetuity, and would therefore make available to future generations a large catalog of creative materials that will otherwise be lost. "However," Congress determined, "to transfer such works into a digital format costs a great deal of money—money which must come either from public or private sources." S. Rep. No. 104-315, at 13. The CTEA addresses this financing problem by granting copyright-owners an additional twenty years of revenues to defray the costs of digitization, thereby increasing the likeli-

hood that digitization will occur. As the Senate Report on the CTEA explained:

> Many of the works we wish to preserve, including the motion pictures and musical works from the 1920's and 1930's that form such an extraordinary part of our Nation's cultural heritage, will soon fall into the public domain. Once in the public domain, the exclusive right to reproduce these works will no longer be protected. Because digital formatting enables the creation of perfect reproductions at little or no cost, there is a tremendous disincentive to investing the huge sums of money necessary to transfer these works to a digital format, absent some assurance of an adequate return on that investment. By extending the current copyright term for works that have not yet fallen into the public domain, including the term for works-made-for-hire (e.g., motion pictures), the bill will create such an assurance by providing copyright owners at least 20 years to recoup their investment. More important, the American public will benefit from having these cultural treasures available in an easily reproducible and indelible format.

S. Rep. No. 104-315, at 13.

Second, Congress considered how best to allocate new and greater-than-expected opportunities for commercial exploitation of creative works, and reasonably concluded that providing these unforseen revenues to authors and creators would be most likely to stimulate production of additional works. When considering the CTEA, Congress was informed by the Register of Copyright that "[t]echnological developments clearly have extended the commercial life of copyrighted works." *The Copyright Term Extension Act of 1995: Hearing Before the Senate Committee on the Judiciary*, S. Hrg. 104-817, 104th Cong.

1st Sess. (Sept. 20, 1995) (Statement of Marybeth Peters, Register of Copyright and Associate Librarian of Congress for Copyright Services). Based on this and other testimony, Congress concluded that "[s]ince 1976, the likelihood that a work will remain highly profitable beyond the current term of copyright protection has increased significantly as the rate of technological advancement in communications and electronic media has continued to accelerate, particularly with the advent of digital media and the explosive growth of the National Information Infrastructure (NII) and the Global Information Infrastructure (GII)." S. Rep. No. 104-315, at 12. "The question," observed the Register of Copyright, "is who should benefit from these increased commercial uses?" Statement of Marybeth Peters, *supra*.

The CTEA implements Congress' judgment that these unforseen revenues should go to authors, creators, and other copyright-owners, since giving additional income to those persons is most likely to promote the "progress of science" contemplated by the Copyright Clause.[14] As Congress explained, "extended protection for existing works will provide added income with which to subsidize the creation of new works. This is particularly

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[14] The Court has been equivocal as to whether it is copyrights that advance "science" and patents that advance "the useful arts," or the reverse. *Compare Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (federal *patent* power "limited to the promotion of advances in the '*useful arts*,' " (emphasis added), with *Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 151 (1998) (the "principal purpose [of the *Copyright Act*] was to promote the progress of the '*useful Arts*' "). This brief associates copyrights with progress in "science," as suggested by the symmetry of the Copyright Clause—"science and useful arts . . . authors and inventors . . . writings and discoveries"—and consistent with the archaic usage of "science" to denote general learning. *See generally* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (2002) § 1.03, at 1-66.17 n.1; Pet. Op. Br. at 15 n.4.

important in the case of corporate copyright owners, such as motion picture studios and publishers, who rely on the income from enduring works to finance the production of marginal works and those involving greater risks (*i.e.*, works by young or emerging authors)." S. Rep. No. 104-315, at 12-13.

2. Any Restriction on First Amendment Freedoms Imposed by the CTEA Is No Greater than Is Essential to Achieve the Government's Legitimate Purposes

As discussed above, the CTEA reaches no further than is necessary to achieve Congress' legitimate and substantial objective of eliminating unfair treatment of American copyright-owners when competing for revenues in European markets. *See supra* Part I.B.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AOL TIME WARNER INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Does Congress have the power under the Copyright Clause to extend the term of existing copyrights?

2. Does the Sonny Bono Copyright Term Extension Act violate the First Amendment?

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INTEREST OF *AMICUS CURIAE*

AOL Time Warner Inc. ("AOLTW") is one of the world's largest holders of copyrights.[1] The fields of creative endeavor in which it generates new copyrights and utilizes existing ones are broad and diverse, including motion pictures, television, literature, magazine publishing, news production, sound recordings, musical compositions, Internet content, comic books, and more. In almost every corner of the copyright sectors of the economy, entities such as Warner Bros., Time, Warner Music Group, CNN, HBO, and AOL are innovative leaders dramatically changing how people across the globe are informed and entertained.

Among the copyrights currently owned by AOLTW are approximately 6,500 motion picture feature titles, 32,000 television episodes, and 8,000 cartoons. This includes the Turner film library, created through numerous acquisitions over many years, which includes hundreds of classic films, such as *Casablanca*, *Citizen Kane*, *The Wizard of Oz*, *Gone with the Wind*, and *Singin' in the Rain* – many of which would no longer be subject to copyright protection in the United States if recent copyright term extensions were invalidated. The CNN news archives contain a massive and unprecedented collection of worldwide video news footage compiled over the past thirty years. DC Comics alone has authored more than 6,000 copyrighted works in the past two decades. In the music industry, AOLTW owns hundreds of thousands of copyrighted musical compositions and sound recordings, and each year it releases more than 2,000 new albums and sells more than 100 million compact discs in the United States alone.

AOLTW has developed a global perspective from its various roles in creating, distributing, and marketing content and from its participation in international markets for

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[1] The parties consented to this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amicus curiae* state that they alone authored this brief, and no other persons or entities made a monetary contribution to its preparation or submission.

publishing, television, motion pictures, music, and the Internet. AOLTW invests many billions of dollars annually to produce and distribute new creative works, in ventures that are increasingly international in scope and involve virtually every country with viable markets. The availability of such investment, including the capacity to finance, market, and distribute new and existing works throughout the world, has become a critical feature of modern artistic activity in every field where AOLTW is involved. Indeed, AOLTW is now one of the largest sources of *new* copyrights registered in the United States each year.

AOLTW respectfully submits this brief to illuminate the various considerations that justify the Sonny Bono Copyright Term Extension Act, 17 U.S.C. §§ 301-04 ("CTEA"), including those uniquely applicable to international competition in the copyright sectors of the economy, in the context of settled principles of judicial review of legislative action.

INTRODUCTION

Petitioners are pressing the Court to declare that Congress exceeds its legitimate authority under the Copyright Clause when it enacts a law extending the term of existing copyrights. It cannot be stated too strongly that such a provision has been part of *every* copyright law Congress has enacted since the First Congress in 1790. For it is clear that "the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land." *Field v. Clark*, 143 U.S. 649, 691 (1892).

Moreover, acceptance of petitioners' premise at this late date would create massive disruption and upend substantial investment-backed reliance interests. It could cast doubt on previous laws extending copyright terms, including the long-debated comprehensive overhaul of the copyright laws enacted in 1976, *see* Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541

(1976), as well as more recent amendments involving rental rights and digital performance rights for sound recordings. In the four years since the CTEA was enacted – and in the quarter-century since the Copyright Act became law – a host of mergers and acquisitions have occurred, and innumerable licenses and contracts have been executed, that depend on valuations of copyrighted works made in line with those prior amendments. The *amicus curiae* AOL Time Warner Inc. is itself the product of several such transactions. Invalidation of those laws now would trigger vast, unanticipated transfers of wealth – including some of the very transfers Congress strove to avoid, from domestic producers to foreign consumers, when it enacted the CTEA to boost existing export revenues – and would wreak havoc with current business plans, settled property rights, and related investment-backed expectations.

SUMMARY OF ARGUMENT

1. In 1998, Congress enacted the CTEA pursuant to its enumerated powers under the Copyright Clause. *See* U.S. Const. art. I, § 8, cl. 8. Under the Court's longstanding precedent, Congress may exercise its enumerated powers as long as its actions are reasonably related to any plausible conception of its legitimate ends. Courts do not otherwise gainsay the policy choices that Congress makes in exercising its express powers unless those judgments clash with fundamental institutional values embodied in the Constitution – namely federalism, the separation of powers, and individual rights. As no such issues are genuinely presented here, the Court should assess the validity of the CTEA under its traditionally permissive approach to evaluating Congress's determinations about how to implement its enumerated powers.

2. In arguing that the CTEA exceeds Congress's authority under the Copyright Clause, petitioners and their *amici* commit two crucial errors. First, they simply assume that the *only* way Congress can legitimately seek to promote the progress of science and the arts in this country is by inducing

individuals to create new works to advance their own individual economic self-interest. This rigid analysis of the relevant incentives is wholly inadequate to the grave task of judging the constitutionality of an Act of Congress. In fact, corporations, organizations, and other entities have contributed greatly to transforming the copyright sectors into major engines driving the American economy – which employ and finance the work of countless individual creators and are now essential to progress in those burgeoning sectors.

Second, even from the narrow standpoint of an individual author's incentives to create, petitioners' assumptions about economic concepts present a caricature of the creative personality. They fail to take into account bequest interests; disregard the effect of international competition on intellectual capital that is highly mobile; and ignore basic influences on optimal copyright terms such as the cost of copying, piracy, and life expectancy. Petitioners and their *amici* thus paint an incomplete portrait that wholly fails to do justice to the complex incentives affecting creative activity, which Congress cannot afford to ignore.

3. Petitioners and their *amici* likewise fail to recognize that Congress's broad authority to make practical judgments in fixing the appropriate duration of copyright terms is inevitably exercised within a competitive international framework. Setting a national policy that reacts to and upon the copyright laws of other countries has always been an important dimension of federal legislation that promotes progress in science and the arts. From this perspective, the CTEA is an important measure that continues the evolution of a distinctively American copyright policy that has changed course over time, but has consistently sought to attract creative talent to the United States and protect our national interest by strengthening the copyright protection on which much of our economy depends. By focusing solely on whether and how the CTEA has succeeded in *harmonizing* American copyright terms

with those of other countries, petitioners miss the larger considerations that have propelled Congress to adjust existing copyright terms.

4. Congress was entitled to exercise its enumerated authority under the Copyright Clause by deciding among competing economic theories about how to promote progress in science and the arts, and by enacting legislation that reflects its considered policy choices. Congress also could reasonably conclude (and did) that extending current and future copyright terms was important to advance American interests within the pervasive scheme of international copyright law. Petitioners' evident disagreement with those policy judgments is not a proper basis for their constitutional challenge to the CTEA.

ARGUMENT

I. UNDER THE COPYRIGHT CLAUSE, CONGRESS MAY EXERCISE ITS ENUMERATED POWERS AS LONG AS ITS ACTIONS ARE REASONABLY RELATED TO ANY PLAUSIBLE CONCEPTION OF ITS LEGITIMATE ENDS.

Apart from certain decisions under the Commerce Clause, where the Court is called on to assess fundamental principles of constitutional federalism, in no case has the Court held that Congress exceeded the proper boundaries of its enumerated powers set out in Article I, Section 8. Petitioners wish to isolate and distinguish the Copyright Clause from the rest of those provisions, in order to establish that this authority is somehow uniquely circumscribed. Those efforts are unavailing.

A. Congress Has Broad Authority Under Article I, Section 8 to Exercise Its Enumerated Powers.

Since its seminal decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court has uniformly held that the enumerated powers specified in Article I, Section 8 confer upon Congress the broadest conceivable authority to implement

those powers effectively. As Chief Justice Marshall stated, the nature of a Constitution, which is "intended to endure for ages to come," *id.* at 415, requires that "only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves," *id.* at 407.

The *McCulloch* Court stated that in "the execution of those great powers on which the welfare of a Nation essentially depends," the Constitution does not limit "the choice of means," but "leave[s] it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end." *Id.* at 415. Since the Constitution authorizes "some choice of means," it permits Congress to "employ those which, in its judgment, would most advantageously effect the object to be accomplished," including "*any* means adapted to the end." *Id.* at 419 (emphasis added).

Having reasoned through the parameters of the enumerated powers conferred upon Congress – in this case, the financial and monetary powers discussed in Article I, Section 8 – the Court summed up its general approach as follows: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional." *Id.* at 421.

In so holding, the Court laid a farsighted path that it would follow for each of the enumerated powers set out in Article I, Section 8. As the Court has said of the taxing power, it will not assume "arbitrary and unreasonable action" by Congress, and will not invalidate a federal law short of such arbitrariness. *United States v. Doremus*, 249 U.S. 86, 93 (1919) (statute must have only "some reasonable relation to the exercise of the taxing authority conferred by the Constitution"). Even with respect to the related uniformity requirement, the Court has held that it will be "reluctant to disturb [Congress's] determination" where, as here, "Congress has exercised its

considered judgment with respect to an enormously complex problem." *United States v. Ptasynski*, 462 U.S. 74, 84-86 (1983). The same broad latitude is understood to be conferred on Congress with respect to the entire array of enumerated powers. *See, e.g., Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937) (Congress's exercise of its authority under the Spending Clause is "obviously a matter of policy and discretion not open to judicial review"); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603-04 (1949) (legislative decisions about appropriate means to govern the Federal District are afforded "great respect" by the Court, regardless of its views about "the wisdom or desirability of such a statute"); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187 (1902) (Congress has "plenary" power under the Bankruptcy Clause); *Ex parte Rapier*, 143 U.S. 110, 134 (1892) ("it must be left to Congress, in the exercise of a sound discretion, to determine in what manner it will exercise the power it undoubtedly possesses" under the Postal Clause); *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (war powers give wide scope for exercise of judgment and discretion and so courts "must give particular deference to the determination of Congress").

In each of these areas of enumerated power, the defining principles of judicial review are the same. In Article I, Section 8, the Constitution expressly identifies broad powers for Congress to exercise as it sees fit after weighing the relevant considerations. Decisions that Congress reaches in choosing among alternative policies are not subject to reconsideration by the courts: "*all* means which are appropriate, [and] which are not prohibited," are constitutional. *McCulloch*, 17 U.S. (4 Wheat.) at 421 (emphasis added). In short, the enumerated powers of Congress confer "broad, often plenary authority over matters within its recognized competence." *Alden v. Maine*, 527 U.S. 706, 713 (1999).

B. Congress's Enactment of the CTEA Under the Copyright Clause Merits Substantial Deference.

Congress's exercise of its authority under the Copyright Clause is subject to the same principles that apply when it implements each of the other powers enumerated in Article I, Section 8. Nonetheless, petitioners argue that the Copyright Clause is unique, allegedly because it is "the only clause in Article I" that specifies both the ends and the means for legislative action, Pet. Br. 15, and thus should be subject to some form of "heightened review," *id.* at 31-32.[2]

Petitioners are wrong. The vast taxing and spending powers are formulated in similar terms: Congress is authorized to "lay and collect Taxes, Duties, Imposts and Excises" and to "pay the Debts" in order to "provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Any constraint potentially imposed by the "general welfare" proviso is minimal, however, for the courts "should defer substantially to the judgment of Congress" on this point. *Helvering v. Davis*, 301 U.S. 619, 640-45 (1937). Legislative power over the militia is expressed in like fashion: Congress is given the power to "provide for calling forth the Militia" in order to secure specified objectives – "to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cl. 15. Here too, the "decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution." *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506-07 (1870).

The enumerated power to establish copyrights and patents "for limited Times," to "promote the Progress of Science and useful Arts," U.S. Const. art. I, § 8, cl. 8, is no more restrictive than these other provisions. And it does not create any inferior capacity than is extended in all the companion provisions of

[2] Petitioners cite *Goldstein v. California*, 412 U.S. 546, 555 (1973), for this proposition, but there the Court made no such claim of uniqueness.

Article I, Section 8. Accordingly, the Court has long held that implementation of the "limited Times" portion of the clause is "subject to the discretion of Congress." *See Pennock & Sellers v. Dialogue*, 27 U.S. (2 Pet.) 1, 16-17 (1829).

Notably, the plain language of the authority conferred is not phrased so as to sanction *only* laws that are entirely prospective; the "plenary" power granted by the Constitution does not countenance "objection to their validity" on the grounds that "they may be retrospective in their operation." *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843). Indeed, throughout our history, Congress uniformly has legislated in tandem by addressing both current and future terms when it has extended the duration of copyright protection beyond that afforded by existing law (including in the First Congress). *See* Act of May 31, 1790, §§ 1 & 3, 1 Stat. 124-25; Act of Feb. 3, 1831, § 1, 4 Stat. 436-39; Act of Mar. 4, 1909, § 23, 35 Stat. 1080; Pub. L. No. 94-553, § 301, 90 Stat. 2541, 72 (1976); Pub. L. No. 105-298, § 102, 112 Stat. 2827-28 (2000).[3] Contrary to petitioners' view, the Court has consistently affirmed that the provisions of the Copyright Clause "have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles." *Goldstein v. California*, 412 U.S. 546, 561 (1973).[4]

[3] Indeed, petitioners' repeated claim that the CTEA is "retroactive" in its operation is misleading at best. *See, e.g.*, Pet. Br. 2, 7, 11, 13, 23. The effect of the statute is analogous to extension of an existing contract, not to *ex post facto* creation of a previously nonexistent contract, and certainly not to *ex post facto* renunciation of a pre-existing contractual obligation.

[4] By the same token, the Court has repeatedly upheld extensions of the terms of existing patents pursuant to Congress's authority under this same provision. *See, e.g., Eunson v. Dodge*, 85 U.S. (18 Wall.) 414 (1873); *Bloomer v. Millinger*, 68 U.S. (1 Wall.) 340 (1863); *Chaffee v. Boston Belting Co.*, 63 U.S. (22 How.) 217 (1859); *Woodworth v. Wilson*, 45 U.S. (4 How.) 712 (1846); *Evans v. Jordan*, 13 U.S. (9 Cranch) 199 (1815).

C. No Countervailing Concerns About Federalism, Separation of Powers, or Violation of Individual Rights Are Present Here.

In *McCulloch*, the Court stated that in reviewing the validity of a federal statute, "to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This Court disclaims all pretensions to such a power." 17 U.S. (4 Wheat.) at 423. The Court has been faithful to this disclaimer for the better part of two centuries. Whenever the question is whether Congress could sensibly have exercised its enumerated powers by making particular choices among means, or fixing defined parameters in terms of numbers, quantities, or duration, the judiciary has consistently deferred to Congress and given it wide latitude to make such determinations. *See, e.g., Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (disapproving judicial "intrusion into the basic line-drawing process that is preeminently the province of the legislature"); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 553 (1949) ("it is a rare case . . . that a constitutional objection may be made to the particular point which the legislature has chosen").[5] And when the Court has invalidated a law enacted by Congress, it has rested on a clear duty to enforce some overriding constitutional concern as to federalism, separation of powers, or violation of individual rights.

The Court's recent Commerce Clause decisions illustrate one limited category of countervailing concerns – matters of federalism. In these cases, the Court has found it necessary to invalidate federal legislation in order to prevent the Federal Government from exercising general "police power" and preserve "a healthy balance of power between the States and the Federal Government." *United States v. Lopez*, 514 U.S.

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[5] Petitioners concede as much. See Pet. Br. 14 ("Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court.").

549, 552 (1995) (quotation omitted); *see also id.* at 569-83 (Kennedy, J., concurring) (statute "contradicts the federal balance the Framers designed and that this Court is obliged to enforce" to maintain key "structural elements in the Constitution"); *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local."). Because the fundamental principle of federalism is embedded in the structure of the Constitution, an infringement of this principle can lead the Court to nullify a decision that Congress has made about how to exercise its enumerated powers. *See Alden*, 527 U.S. at 713-14 (Congress's enumerated powers inherently limited by States' role in constitutional design of federalism, reinforced by Tenth Amendment). In this instance, however, the 1976 statutory revision expressly preempted all state law providing equivalent rights in the subject matter of federal copyright. *See* 17 U.S.C. § 301(a). Thus no issue as to "Our Federalism" is at stake here.

A second structural roadblock to legislative action is the doctrine of the separation of powers, which likewise can be invoked to invalidate federal statutes that are otherwise enacted within the proper scope of Congress's enumerated powers. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (law enacted under Bankruptcy Clause, which conferred Article III authority on Article I judges, violated separation of powers); *Myers v. United States*, 272 U.S. 52 (1926) (law enacted under Postal Clause, which interfered with President's Article II removal power, violated separation of powers). Because separation of powers – like the essential principle of federalism – is inherent in the structure of the Constitution, it likewise trumps Congress's enumerated powers. Yet in this case there is no basis for discerning any encroachment on the powers of the other branches or any related issues concerning the separation of powers.

The sole remaining way in which the means Congress has chosen to exercise its enumerated powers can be "prohibited," *McCulloch*, 17 U.S. (4 Wheat.) at 421, is where a federal statute violates one of the individual rights guaranteed by the Constitution. Petitioners contend that the CTEA violates the First Amendment, but the Court has long settled that questions about the proper scope of copyright do not implicate principles of free speech because the "distinction between copyrightable expression and uncopyrightable facts and ideas," coupled with "the latitude for scholarship and comment traditionally afforded by fair use," already ensure ample constitutional protection. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-62 (1985).[6]

Since the CTEA does not interfere with any individual rights, the scope of judicial review cannot logically be stricter than the lowest form of scrutiny, which is rational basis review under the Equal Protection Clause. In that context, the Court has explained that a statute must be upheld unless "it rests on grounds wholly irrelevant to the achievement of the [governmental] objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993) (quotation omitted). In this instance, there is no equal protection issue at all; the constitutional challenge is aimed only at the original fount of legislative authority. Accordingly, if the CTEA bears a reasonable relationship to any plausible

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[6] Because *Harper & Row* forecloses any free speech challenge here, it also precludes application of "constitutional doubt" as a basis for rewriting the provisions of the CTEA. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (doctrine of constitutional doubt "is not designed to aggravate that friction [among the branches] by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate"); *Miller v. French*, 530 U.S. 327, 341 (2000) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." (quotation omitted)). Aside from these points, we do not otherwise address the First Amendment issue, which is fully canvassed elsewhere.

conception of how to attain Congress's legitimate ends, it must be upheld as constitutional. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted . . . .").

II. CONGRESS'S DECISION TO EXTEND THE TERM OF CURRENT AND FUTURE COPYRIGHTS IN THE CTEA LIES WELL WITHIN THE REALM OF ITS CONSTITUTIONAL AUTHORITY.

The CTEA is reasonably related to a plausible conception of how to "promote the Progress of Science and useful Arts" in at least two ways: (1) Congress made a reasonable choice among competing economic analyses of how further extension of copyright terms would affect incentives to create new works and preserve and disseminate existing works, both for individuals and for the entities that are increasingly vital to organizing and funding large-scale creative ventures; and (2) Congress reasonably determined that the CTEA would position American copyright policy advantageously in the framework of international copyright law.

At the outset, it bears emphasis that Congress carefully considered the provisions of the CTEA over the course of several years. As discussed below, in the two decades after the Copyright Act was passed in 1976, new developments revolutionized the international regime of copyright law. After 1989, when the United States acceded to the Berne Convention, American copyright law entered a novel phase, in which "foreign and international copyright are subjects of unprecedented importance." 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 17.01, at 17-4 (1998). In reaction to changes in copyright law worldwide, a bipartisan group of Senators introduced the CTEA on March 2, 1995 "to safeguard the Nation's economic interests and those of America's creators in the protection of copyrighted works

abroad." S. Rep. No. 104-315, at 5 (1996). Three sessions of Congress later, after hearings in both chambers generated extensive written and oral testimony building on investigations and materials by international tribunals, the CTEA was enacted.

In particular, Congress noted that around 1960, "the Permanent Committee of the Berne Union began to reexamine the sufficiency of the life-plus-fifty-year term of protection" that had long been the norm in Europe but only belatedly was adopted in the United States in 1976. S. Rep. No. 104-315, at 7. As a result, the European Union issued a directive in 1993 that its member countries must implement a term of protection equal to the life of the author plus 70 years by 1995. *See id.* Many other countries have followed. As this figure promised to become the new global standard, and as Congress considered the unprecedented effects of "the information superhighway," which exploded into existence in the past two decades and now "offers widespread distribution of copyrighted works to almost anywhere in the world at limited costs," *id.* at 8, it was judged advisable to address these issues by enacting the CTEA. In short, this legislation was not the product of "momentary political convenience," *Lopez*, 514 U.S. at 578 (Kennedy, J. concurring); instead, it was carefully crafted in response to substantial new concerns generated by changes in technology, international law, and foreign markets.

A. The Economic Analysis of the CTEA by Petitioners and Their *Amici* Is Inadequate and Incomplete.

The arguments presented by petitioners and their *amici* are sharply undermined by a series of mistaken or misleading assumptions about the economic theories that support the copyright and patent laws. For example, petitioners incorrectly assume that the *only* way Congress can legitimately seek to promote the progress of science and the arts is by providing the prospect of immediate financial rewards that will induce individuals to create new works in order to advance their own

personal economic self-interest, narrowly conceived. *See, e.g.*, Pet. Br. 19-23. But that is only a small part of the total picture, as fewer and fewer creative works of art, entertainment, and education result from the concentrated efforts of a solitary creator in a garret who depends on the generosity of a patron or the beneficence of the government. In today's world, the production of many types of copyrighted works requires assembling people with diverse talents and skills, backed by extensive financial resources, to produce, market, and distribute the resulting works successfully. These capabilities in turn provide dramatic new incentives for individual creators.

Indeed, some of the most popular forms of modern creative expression – motion pictures, television, and music – are the products of a multitude of creative individuals, including writers, producers, performers, video operators, recording engineers, and corporate executives, along with an array of technicians and artisans. And the contribution that these works make to progress in science and the arts is maximized when they are made available to the widest possible audience. The exclusivity that the copyright laws provide to copyright holders is essential to make it possible for them to undertake the enormous expense involved in bringing these works to public attention through advertising and promotion, as well as packaging and delivering these works for exhibition, sale, and rental without fear that their efforts will be undercut by rival distributors who seek to "free ride" upon their efforts.

A principal reason why institutional entities have become central to the creation of new works in the copyright sectors is that the cost and frequency of failure have become so extraordinarily high. The recording industry alone "spends more than $1 billion a year on nurturing and developing artists, even though 90% of all music releases are unsuccessful." Tamara Conniff, *Sea Changes in Music Biz Leave Rank and File Adrift*, Hollywood Rptr., June 21, 2002, at 1, 21. The cost of marketing and promoting new music to radio ranges from

$250,000 to $1 million per single. *See id.* This is also "particularly important in the case of corporate copyright owners, such as motion picture studios and publishers, who rely on the income from enduring works to finance the production of marginal works and those involving greater risks (*i.e.*, works by young or emerging authors)." S. Rep. 104-315, at 12-13. And these financial concerns have been exacerbated in recent years by significant and growing problems with piracy both in this country and around the world. *See* Edna Gundersen, *Any Way You Spin It, the Music Biz Is in Trouble*, USA Today, June 5, 2002, at 1A.

Extension of existing copyright terms thus directly affects the incentives and capabilities of these institutional entities to create new copyrighted works. The profits generated by exclusive rights over the rare successes in these high-risk endeavors are the seed corn needed to sow the fields for the next round of creative works. The steady stream of profits from the older classic films of the Turner Library, or from musical compositions like Gershwin's *Rhapsody in Blue* – which continue to generate millions of dollars in revenue but whose copyright protection would be slated to expire but for the CTEA – makes the "tail-end" years of copyright protection extraordinarily important, even though most works have a much shorter shelf-life.[7] Congress could reasonably conclude that the special importance of these rare works, and their capability under copyright protection to subsidize the cost of new creative works, justified the term extension enacted in the CTEA.

Given that the copyright sectors now constitute 5.7 percent of the total gross domestic product – and represent our second

[7] Indeed, Congress had before it a report that estimated the annual royalties of book, music, and movie copyrights expiring in each of the years affected by the term extension provided by the CTEA, which grew steadily from an aggregated $53 million in 2002 to an aggregated $317 million in 2017. *See* Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, Cong. Research Serv. Rep. 16 (May 11, 1998).

largest export, with $40 billion in foreign sales in 1994 – it is eminently reasonable for Congress to calculate that specific measures to boost profits in these industries will directly serve to promote "Progress of Science and the useful Arts" within the meaning of the Copyright Clause. *See* S. Rep. No. 104-315, at 9. Extension of copyright terms also renders it economically feasible for those entities to utilize newly developed technologies to make existing works available in new and attractive formats to new as well as repeat audiences, again serving to promote science and the arts. *See id.* at 13.

In addition, Congress had an even more immediate and tangible objective in mind with the CTEA, when it extended the duration of existing and future copyright terms to life of the author plus 70 years. Based on an EU directive, all member states in the European Union are to harmonize their copyright laws by adopting this same span. *See* Council Directive 93/98, 1993 O.J. (L 290/9). Each is also directed to apply the "rule of the shorter term" to countries outside the EU, *see id.* art. 7, which means that if the U.S. law provides shorter terms, then U.S. copyright holders will not receive the full protection otherwise afforded in the EU. Thus the CTEA "ensure[s] that profits generated from the sale of U.S. intellectual property abroad will come back to the United States." H.R. Rep. No. 105-452, at 4 (1998). Even on petitioners' own terms, this represents substantial additional funding for American authors to subsidize the creation of new works. *See* 141 Cong. Rec. S3391-93 (daily ed. Mar. 2, 1995) (statement of Sen. Hatch).

From the standpoint of an individual author, moreover, petitioners and their *amici* omit key incentives for creative activity. For instance, they downplay bequest interests, which generate distinct financial motivations for many individuals later in life. In fact, "we know that bequest motives play a role in people's decisions to work, save, and so on, and those motives depend on the altruistic feelings that people have, primarily for members of their family, including descendants."

William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 363 (1989).[8]

In the United States, as in Europe, policymakers found that general prolongation of the expected life span required existing copyright terms to be adjusted. Since "the majority of American creators anticipate that their copyrights will serve as important sources of income for their children and through them into the succeeding generation," the CTEA discarded the life-plus-50 term and replaced it with a life-plus-70 term to reflect the longer lives of their children and grandchildren. S. Rep. No. 104-315, at 10-11; *see* H.R. Rep. No. 105-452, at 4 (same); Council Directive 93/98, recital (5), 1993 O.J. (L 290/9) (same). That squares with rudimentary economic theory, since an increase in the life span of one's heirs justifies a corresponding increase in the amount of protection passed on at the author's death. But petitioners simply decline to credit such considerations.[9]

Other factors similarly bear upon the proper scope of copyright protection. As the cost to make a copy of an existing

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[8] One example is the grim battle Ulysses Grant waged to write his *Memoirs* before his death from cancer, shortly after he lost all his money when his banking partner defrauded investors. Grant worked doggedly for nine months to save his family from financial ruin, and the two volumes, completed five days before his death, ultimately did so by generating almost $450,000 in royalties for his widow. *See* Ulysses S. Grant, *Memoirs and Selected Letters* 1157-61 (Library of America 1990) (1886). In petitioners' account, such conduct could only be regarded as irrational.

[9] Consideration of bequest interests means that it is no longer proper simply to discount everything to the individual author's own present value. And the discounting performed by petitioners' *amici* is lacking in another important respect: although they have discounted the anticipated *revenue* from an extension of existing terms, on the other side of the ledger they have not discounted any of the anticipated *costs* that would be incurred in future creative activity. *See* Econ. Br. 5-7 & App. B. Thus the entire calculus has been left incomplete. *See* Landes & Posner, *supra*, at 362.

work decreases, economic analysis suggests that the optimal term of copyright protection should be increased. *See* Landes & Posner, *supra*, at 341-44, 363. And this has indeed been a notable effect of the recent explosion of information technology. Because of the dramatic strides made in reproduction, display, and distribution of documents, information, audio, and video through computers and the Internet since 1976, it would be remarkable if the scope of copyright protection had not been extended over this same period, and indeed Congress found it necessary to extend copyright terms in part for this reason. *See* S. Rep. No. 104-315, at 6-7. Moreover, serious and growing problems of piracy now plague all the copyright sectors, increasing costs and reducing revenues. *See* 143 Cong. Rec. S6048 (daily ed. June 2, 1997) (statement of Sen. Abraham). Accordingly, copyright protection must be expanded to maintain the same level of financial incentives and rewards for copyright holders. *See Sony Corp.*, 464 U.S. at 430-31 ("From its beginning, the law of copyright has developed in response to significant changes in technology. . . . Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.").

It is not necessary that any of these economic points, taken alone or together, be found compelling. Instead, it is enough that they provide plausible grounds for Congress to make judgments about how to proceed in evaluating and acting upon legislative proposals like the CTEA. As Justice Holmes aptly said, the Constitution "does not enact Mr. Herbert Spencer's *Social Statics* [or] embody a particular economic theory, whether of paternalism . . . or of laissez faire." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Even if petitioners' account of the relevant economic analysis of the copyright sectors were not flawed in important respects, there can be no doubt that these issues and theories are debatable. In the face of competing views about how to attain its legitimate

ends, Congress is entitled to make such reasonable judgments within the province of its enumerated powers.[10]

B. Longstanding Concerns About Locating American Copyright Policy in the Structure of International Law Warrant Deference to Congress.

The CTEA reflected deep concern in Congress about how changes in domestic copyright policy would affect our position in the framework of international copyright law. *See* S. Rep. No. 104-315, at 3-10; H.R. Rep. No. 105-452, at 3-4. This is hardly surprising, for the history of American copyright law shows that Congress has been sensitive to how our laws interact with those of other nations. Because of this careful attention to the importance of international law and markets for intellectual property, "the Federal patent and copyright systems are now the largest in the world, and support a technological and intellectual outpouring which has given the United States primacy in power and influence among nations." Bruce W. Bugbee, *Genesis of American Patent and Copyright Law*, at v (1967).

1. Congress's Need for Flexibility to Respond to Evolving Considerations in Copyright Policy.

Congress's views about how copyright policy should be shaped to promote progress in the fields of creative endeavor have evolved greatly through the years. A brief review of this history confirms the importance of allowing Congress flexibility to adjust copyright policy in light of the complex domestic and international considerations that have arisen over time.

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[10] Petitioners also frequently allude to the evils of "monopolies," Pet. Br. 10, 22-26, though the wide gulf between legal protection of intellectual property and grant of a monopoly privilege was recognized long ago. *See Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 607 (1837) (quoting Edward Coke, III, *Institutes of the Laws of England*, c. 85). In the years since, legal developments such as the "fair use" doctrine and the idea/expression distinction have widened this gulf even further.

During the Revolutionary War, Paine advocated "the honour and service of letters, and the improvement of science" by laws "to prevent depredation on literary property," pointing to Russia and France for their "wise encouragement" of science and learning. Thomas Paine, *Letter to the Abbe Raynal, on the Affairs of North America* (1782), *in The Complete Writings of Thomas Paine* 213 n.1 (Philip S. Foner ed., 1945). The First Congress responded, enacting copyright protection for maps, charts, and books authored by citizens or residents of the United States and their executors, administrators, or assigns. *See* Act of May 31, 1790, § 1, 1 Stat. 124.

It is striking, however, that for decades the United States was aggressively a pirate nation, affording no copyright protection at all to foreign works. *See id.* § 5, 1 Stat. 125. The first revision of the copyright laws extended the same approach. *See* Act of Feb. 3, 1831, § 8, 4 Stat. 438; 4 *Nimmer on Copyright* § 17.01[C][1], at 17-12. In an era when American literary production was in gestation, this regime promised to maximize opportunities to bring foreign works cheaply into the American marketplace, and was strongly supported by domestic publishers. It also encouraged foreign authors to come to the United States if they wished to profit from their works here. Yet it had the perverse effect of flooding American markets with pirated works by uncompensated English writers. This stifled the growth of American letters to the point where, as late as 1820, one British wag famously exclaimed, "'In the four quarters of the globe, who reads an American book?'" *United Dictionary Co. v. Merriam Co.*, 208 U.S. 260, 264 (1908).

The drawbacks and injustices of this scheme fueled pressure for legislative reform.[11] Not until 1891, however, did

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[11] During the same period, Chancellor Kent drew on comparisons with German, French, and British law to criticize "the scanty and inadequate protection" that Congress afforded to copyright terms. 2 James Kent, *Commentaries on American Law* 306-14 (1827).

Congress accept reciprocity as a key feature of American copyright law, by extending protection to foreigners whose countries did the same for Americans. *See* Act of Mar. 3, 1891, § 13, 26 Stat. 1106. Resistance from the printing industry was eased by the "manufacturing clause," which provided certain elements of protectionism for the benefit of American printers. *See generally* S. Rep. No. 94-473, at 146-51 (1975).[12]

During the same period, concerns about parochial treatment of foreign authors spawned broader initiatives to create an international structure for copyright law. The ultimate product of these deliberations was the Berne Convention for the Protection of Literary and Artistic Works, which created a new framework for coordinating national copyright laws, based on the principle of "national treatment" of foreign works from other treaty nations (*i.e.*, treatment on the same footing as domestic works) combined with a set of minimum required rights. Although the United States refused to join the Berne Convention for more than a century, Congress maintained a policy of reciprocity in its further revisions to the copyright laws. *See* Act of Mar. 4, 1909, § 8, 35 Stat. 1077.

On the diplomatic front, the United States operated by bilateral agreements with other countries. In 1955, we joined the Universal Copyright Convention, our first multilateral copyright organization. In 1989, we finally acceded to the Berne Convention, which had emerged "as the governing instrument in the world of international trade," joining more than 100 other nations. 4 *Nimmer on Copyright* § 17.01, at

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[12] In an influential article, the Assistant Register of Copyrights commented: "Until the Second World War the United States had little reason to take pride in its international copyright relations; in fact, it had a great deal to be ashamed of. With few exceptions its role in international copyright was marked by intellectual shortsightedness, political isolationism, and narrow economic self-interest." Barbara A. Ringer, *The Role of the United States in International Copyright – Past, Present, and Future*, 56 Geo. L.J. 1050, 1051 (1968).

17-4. American copyright law thus entered a new phase, in which "internationalization is an integral component of U.S. copyright lawmaking." Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. Pa. L. Rev. 469, 483 (2000).

Much of this change is attributable to sheer economics. Until World War II, the United States was a net copyright importer, but since then it has become the principal copyright exporter in the world. *See Hearings on S. 1301 & S. 1971 Before the Subcomm. on Patents, Copyright & Trademarks of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess., at 57 (1988) (testimony of Rep. Kastenmeier). The tremendous growth of the copyright sectors of the American economy has raised this country to global primacy in the realm of intellectual creativity. "Over 40 percent of our revenue currently comes from foreign markets and our greatest opportunity for growth is overseas." 4 *Nimmer on Copyright* § 17.01, at 17-4 n.1.1 (quotation omitted). In consequence, the United States has assumed the mantle of world leadership by setting an example that encourages other nations to adopt strong, balanced copyright protection and to reduce piracy, which causes losses for American copyright holders that have "mounted into the billions of dollars." *Id.* § 17.01[C][1], at 17-15.

In its efforts to promote progress in science and the arts, Congress has thus swung from a stubborn policy of protectionism, to one of measured reciprocity, to the current policy of outspoken leadership in advocating closer global integration of national regimes of copyright law. This evolution in Congress's perceptions about how best to foster progress in science and the arts shows why the Court should not now decide that only one single approach is permissible. *See Stewart v. Abend*, 495 U.S. 207, 230 (1990) ("evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces [and] it is not our role to alter the delicate balance Congress has labored to achieve"). Instead,

Congress should maintain the flexibility to respond to changes in the international sphere by calibrating matters like the optimal duration of copyright terms in light of the incentives that it concludes are needed to keep the United States at the global forefront in producing intellectual property. *See McCulloch*, 17 U.S. (4 Wheat.) at 407 ("we must never forget, that it is a *Constitution* we are expounding") (emphasis in original).

Petitioners' focus – which dwells on providing immediate financial incentives for individual authors to produce new works, *see, e.g.*, Pet. Br. 19-23 – represents a strait-jacket that the Court should be loath to embrace. Their narrow approach fails entirely to come to grips with the multi-faceted considerations of foreign trade, cultural and economic policy, and diplomatic relations that have constantly informed American copyright policy for over two centuries. The Copyright Clause itself bars Congress from granting perpetual copyrights by confining them to "limited Times." *See, e.g.*, *Sony Corp.*, 464 U.S. at 443 n.23 ("copyright protection is not perpetual"). Yet it does not otherwise restrict Congress from making reasonable choices, including whether to advance current (and mutable) perceptions about how to "promote the Progress of Science and useful Arts" by extending the terms of existing and future copyrights in light of the protections afforded elsewhere in the world. U.S. Const. art. I, § 8, cl. 8.

Congress has explicitly recognized that "[c]opyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless." S. Rep. No. 94-473, at 118 (1975). Faced with the increasing mobility of intellectual capital, Congress has consistently sought to adapt the copyright statutes to protect American interests. At this juncture, Congress could sensibly conclude that those interests may best be promoted by extending the rights of current and

future copyright holders in the United States to match or exceed the protections conferred on their competitors in important foreign markets.

Indeed, the pertinence of international concerns warrants even greater deference to Congressional judgments. *See, e.g.*, *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Here, in fact, Congress's own judgments reflected those articulated by the Executive Branch. *See* 134 Cong. Rec. H3082 (daily ed. May 10, 1988) (statement of Rep. Kastenmeier) ("'it is often hard to convince other countries to provide strong copyright protection when we do not'") (quoting Letter of U.S. Trade Rep. Clayton Yeutter). The CTEA is an important measure that continues the evolution of a distinctively American copyright policy that has changed course over time, but consistently has sought to foster creative activity, initially by a protectionist policy and now by asserting global leadership to build on the pre-eminent strength of the copyright sectors of our economy. One might regard these policies as inconsistent or even misguided at times, but none is unconstitutional. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928) ("Whatever we may think of the wisdom of a protection policy, we cannot hold it unconstitutional.").

2. *The CTEA Is Valuable in Securing Export Revenues and Positioning Domestic Policy in the Context of International Copyright Law.*

By focusing solely on whether and how the CTEA has succeeded in *harmonizing* American copyright terms with those of other countries, *see, e.g.*, Pet. Br. 42-44, petitioners miss the larger international considerations that have propelled Congress to adjust existing copyright terms. For example, the intellectual property law professors concede that the CTEA "may, as its sponsors promised, 'ensure that the United States will continue to receive the enormous export revenues that it does today from the sale of its copyrighted works abroad.'" IPLP Br. 6-7 (quoting Cong. Rec. H9950 (Oct. 7, 1998) (remarks of Rep.

Coble)). Yet they simply assert an absolute disconnect between this result and the creation of new works, while complaining that the harmonization of American and European copyright terms remains incomplete. *See id.*

Both points reflect a flawed perspective. First, as noted above, securing hundreds of millions of dollars in export revenues – all of which would otherwise be forgone – provides considerable new capital for American institutional entities in the copyright sectors, much of which will be plowed back into financing, marketing, and distributing new creative endeavors, including by way of payments to individual authors. At a minimum, Congress could legitimately conclude that this was *likely* to be one of the desirable consequences if current and future copyright terms were extended. *See* S. Rep. No. 104-315, at 3 (purpose of CTEA "is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works").

Second, even if the CTEA left the harmonization of international copyright terms imperfect in various respects, it would be enough for Congress to determine that *closer* harmonization or even incremental harmonization in certain important aspects would be advantageous to individuals and institutions in the copyright sectors of the American economy – which is surely plausible here. *See, e.g.*, *Heller*, 509 U.S. at 321 (courts are compelled "to accept a legislature's generalizations even when there is an imperfect fit between means and ends").[13] Finally, petitioners' approach ignores the broader benefits resulting from the ability of the United States

[13] Petitioners criticize the CTEA for moving the United States from a majority rule on copyright terms (life plus 50) to a minority rule (life plus 70), *see* Pet. Br. 43, without ever acknowledging that the latter rule is the evolving international trend, with a growing list of nations – including many of those with the largest markets for American copyrighted works – now adopting the longer term.

to play a leadership role in the international copyright system, which includes shaping global norms for appropriate protection in response to new technologies.

C. The CTEA Is Reasonably Related to a Plausible Legislative Conception of How to Promote Progress in Science Within the United States.

These concerns about foreign trade and international law amply justify Congress's decision to enact the CTEA. In sum, there are at least *five* ways in which Congress could (and did) sensibly conclude that extending current and future copyright terms is reasonably related to a plausible conception of how to promote progress of science and the arts in the United States, based on its multi-year consideration of the CTEA.

First, extending our copyright terms to match the European Community avoids expected losses to American copyright holders from application of the "rule of the shorter term." The direct result is to capture all available profits from such exports, which provides additional financial incentives for copyright holders (including both institutional entities and individuals) to "produce [new] works," "restore older works and further disseminate them to the public." H.R. Rep. No. 105-452, at 4; *see also* S. Rep. No. 104-315, at 4-5, 8-10. Increased financial incentives, as even petitioners concede, are likely to "promote Progress" in science and the arts here in the United States.

Second, extending our copyright terms to reflect changes in average life span, the cost of copying, and the expected useful life of creative works increases the incentives to create new works, to invest in preserving existing works, and to develop ways to make them accessible to the public, such as digital formatting. *See, e.g.*, S. Rep. No. 104-315, at 10-13.

Third, establishing closer harmonization between the terms of American and European copyrights – even if that harmony remains imperfect – lessens the burdens and costs of doing business internationally for American copyright holders, which

creates further incentives to produce new creative works. *See, e.g.*, *id.* at 8. This concern is underscored by the "information superhighway," which now "offers widespread distribution of copyrighted works to almost anywhere in the world at limited costs," but is hampered by the complexities and strategic issues posed by different copyright terms in distinct markets. *Id.*

Fourth, the United States can advance its objective of strengthening copyright protection in other nations by conferring greater protection within its own borders. This in turn solidifies our global leadership role in setting appropriate copyright standards, and improves our ability to fight "[f]oreign piracy of intellectual property," which has emerged "as one of the most important international trade issues for the United States." *GAO Report on Intellectual Property Protection Abroad*, Apr. 1, 1987, in 1987 Copyright L. Rep., New Dev. (CCH) ¶ 20,438. The expected consequence would be to increase profits for American copyright holders by boosting exports of intellectual property, thereby generating billions of dollars in additional financial incentives for the creation of new works here. *See, e.g.*, S. Rep. No. 104-315, at 7-8.

Fifth, by making good on an implicit promise that American copyright law will be updated regularly to provide strong protection for authors, Congress provides more incentive and greater security for foreign and domestic copyright holders to locate in the United States, thereby promoting progress in science and the arts here. *See, e.g.*, S. Rep. No. 104-315, at 9.[14]

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[14] The "outer limits" of this strategy, of course, are set by the Constitution, *Lopez*, 514 U.S. at 566, which would not permit *either* copyright terms in perpetuity *or* terms that bear no reasonable relation to any plausible conception of how to advance the legitimate objectives of the Copyright Clause. Neither boundary is implicated here; indeed, the term set by the CTEA fits comfortably within traditional legal notions of a "limited" rather than a "perpetual" estate. *See, e.g.*, Uniform Statutory Rule Against Perpetuities, 8 U.L.A. § 1(a)(2) (uniform proposed law adopted by 19 States provides 90-year period for contingent property interests to vest).

Importantly, with respect to each of these rationales, in order to achieve the stated objectives it is essential to adopt uniform rules for all works of a particular kind, such as by extending *both current and future* copyright terms in tandem. Again, the text of the Constitution itself draws no distinction in this regard, and the lessons of economic theory and international copyright law are equally applicable to both types of term extension.[15] And this has been the uniform historical practice over the years, whenever Congress has extended the existing terms of patents and copyrights, *see* p.9 & n.4, *supra*, which itself is strong evidence supporting the constitutionality of this approach. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936) ("The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.").

The vast disruption of investment-backed reliance interests that would occur if the CTEA were struck down is also highly relevant. Judicial invalidation of this statute "would defeat the reliance interest of those corporations which have structured their activities" based on provisions extending existing copyright terms, and thus would "disrupt settled expectations in an area of the law in which the demands of the national economy require stability." *Allied-Signal, Inc. v. Director, Div. of Tax'n*, 504 U.S. 768, 786-87 (1992). Countless transactions and business decisions have been based on valuations of copyrighted works made in line with existing law, and they cannot now be undone. *See* Arnold Plant, *The Economic Aspect of Copyright in Books*, 1 Economica (n.s.) 167, 194 (1934) ("in a matter which affects so large and valuable a

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[15] The Berne Convention likewise requires protection to be granted to all works whose terms had not yet expired and thus had "not yet fallen into the public domain" in the country of origin. *See* Berne Convention, art. 18(1).

property, and so many vested interests as have been created under copyright laws," it is "unjust and inexpedient" to change the law "except in the most gradual and tentative manner") (quotation omitted). A ruling that overturns the CTEA would trigger large, unanticipated transfers of wealth, both within and away from the copyright sectors, including the loss of massive export revenues that Congress had captured to finance and promote further creative activity here in the United States. No such result can be justified.

CONCLUSION

For these reasons, the decision below should be affirmed.

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v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICUS CURIAE* THE INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF THE RESPONDENT

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BRIEF FOR *AMICUS CURIAE* THE INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF THE RESPONDENT

INTEREST OF AMICUS CURIAE [1]

Amicus Curiae Intellectual Property Owners Association ("IPO") is a nonprofit, national organization of nearly 100 large and midsize companies and more than 200 small businesses, universities, inventors, authors, executives, and attorneys who own or are interested in patents, trademarks, copyrights, and other intellectual property rights. Founded in 1972, IPO represents the interests of all owners of intellectual property. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the Appendix.

[1] The Parties have consented to the filing of this brief *amicus curiae*.

IPO's involvement in this case is prompted by two interrelated considerations. First, IPO's members rely heavily on the protections afforded by intellectual property laws both in the United States and abroad. As harmonization of intellectual property laws around the world becomes an international priority, IPO's members have a strong interest in ensuring that U.S. law keeps pace with emerging intellectual property laws in other countries. In particular, IPO members seek to ensure that their investment in intellectual property is not threatened by disparities between U.S. laws and those of other countries with whom the U.S. has a favorable balance of trade in intellectual property.

Second, IPO seeks to ensure that Congress has the power to adapt U.S. intellectual property laws to changing world conditions and to protect the interests of U.S. intellectual property owners abroad. In order for Congress to respond effectively to a rapidly changing international landscape of intellectual property laws, it must have a broad constitutional authority to legislate. This case challenges the foundation on which Congress may make changes to existing copyright rights. It thus presents an opportunity for this Court to define Congress' constitutional mandate in this area both clearly and broadly.

While IPO believes that the constitutionality of the CTEA can and should be upheld under the Copyright Clause alone, that issue will be fully briefed by the parties. If the Court concludes that the Copyright Clause cannot sustain the CTEA, IPO believes that due consideration should be given to whether an alternative constitutional foundation for the statute—specifically, the Commerce Clause—should be recognized.

INTRODUCTION

This case presents an important yet narrow question regarding the constitutional basis for Congress' retrospective

extension of the term of federal copyright protection for certain works from life-of-the-author-plus-50 years to life-of-the-author-plus-70 years, as embodied in the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 ("CTEA"). Congress enacted the CTEA to keep pace with evolving international copyright standards and to protect U.S. copyright interests abroad and preserve our favorable balance of trade resulting from the export of copyrighted works. Given the foreign trade considerations that provided much of the impetus for passage of the CTEA, there can be little doubt that the statute bears a "substantial relation" to interstate and foreign commerce such that it passes constitutional muster under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549 (1995). Accordingly, irrespective of whether the CTEA can be sustained solely on the basis of the powers conferred by the Copyright Clause, the statute may be upheld as a valid exercise of Congress' concurrent powers under the Copyright and Commerce Clauses of the Constitution.

SUMMARY OF ARGUMENT

This Court has long recognized that the Copyright Clause is not the only enumerated power from which Congress might derive authority to grant intellectual property rights. *See Trade-Mark Cases*, 100 U.S. 82, 95 (1879). This Court in the *Trade-Mark Cases*, and two courts of appeals in more recent decisions,[2] have recognized that Congress can grant intellectual property rights under the Commerce Clause—even if those rights do not independently satisfy the prerequisites of the Copyright Clause—as long as the requirements of the Commerce Clause itself are met. In the case of the CTEA, those requirements are easily satisfied.

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[2] *See United States v. Moghadam*, 175 F.3d 1269, 1278-80 (11th Cir. 1999); *The Authors League of America, Inc. v. Oman*, 790 F.2d 220, 224 (2d Cir. 1986).

It is irrelevant that Congress did not explicitly invoke its Commerce Clause powers in passing the CTEA. Nor is it of any consequence that Congress did not make formal findings as to the substantial relationship between the extension of the federal copyright term and interstate or foreign commerce. *See Lopez*, 514 U.S. at 563-64. In fact, the legislative history of the CTEA amply demonstrates Congress' concern for protecting U.S. copyright interests abroad in the wake of changing international copyright standards, and for preserveing our surplus balance of trade in intellectual property in the process. *See* S. Rep. No. 104-315 at 3 (1996) ("S. Rep."). That legislative history makes abundantly clear that the extension of the copyright term "substantially affects" interstate and foreign commerce, and thus falls within Congress' regulatory power under the Commerce Clause. *Lopez*, 514 U.S. at 559.

Nothing in the language, history or structure of the Copyright Clause dictates that it be the sole basis for Congress' authority to legislate in the intellectual property arena, including copyright. Moreover, finding a concurrent basis for Congress' enactment of the CTEA under the Commerce Clause would not run afoul of the constitutional scheme.

In particular, upholding the constitutionality of the CTEA under both the Copyright and Commerce Clauses would not "eradicate" any "affirmative limitation" imposed by the Copyright Clause, including its "limited times" requirement. The Copyright Clause's "limited times" language is not a constitutional imperative applicable to all intellectual property legislation. Unlike the Bankruptcy Clause at issue in *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982), which this Court found imposed a uniformity requirement that precluded any "non-uniform" bankruptcy legislation, the Copyright Clause does not prescribe a "limited times" requirement for all intellectual property

legislation, and perhaps not even all federal copyright legislation. Particularly in an area intimately related to foreign commerce considerations, Congress should be accorded the latitude to extend the intellectual property protections currently available to U.S. citizens and companies pursuant to Congress' broad authority under the Commerce Clause.

ARGUMENT

I. THE COPYRIGHT CLAUSE IS NOT THE SOLE CONSTITUTIONAL BASIS FOR FEDERAL INTELLECTUAL PROPERTY LEGISLATION

The CTEA was enacted to harmonize the term provisions of the Copyright Act with their original legislative intent, U.S. interests in protecting its foreign commerce, and the subsequent trend of foreign law. Consequently, the CTEA extended the terms of both then-existing and future copyrights. Petitioners argue that the provisions of the CTEA that extended the term of *existing* copyrights are unconstitutional because they exceeded the scope of the legislative powers conferred by the Copyright Clause. *See* U.S. Const. art I, § 8, cl. 8.

Petitioners' arguments presume that if power to enact the CTEA was not conferred by the Copyright Clause of the Constitution, then the statute cannot be upheld as a constitutional exercise of federal legislative power. This premise may be understandable given that the lower courts sustained the constitutionality of the CTEA solely under the Copyright Clause.

But this premise is false. It can be reconciled with neither the independent nature of Article I's grants of legislative powers nor the history of the Copyright Clause. Consequently, even if some provisions of the CTEA were to

exceed the scope of the powers granted by the Copyright Clause, they would be well within the scope of the powers granted by the Commerce Clause.

Recognizing the substantial overlap between the subject matter of the Commerce and Copyright Clauses does not necessarily mean that Congress can use the Commerce Clause to grant any sort of "copyrights." Difficult legal questions might arise were the Commerce Clause used to grant copyrights utterly inconsistent with the fundamental principles of the Copyright Clause—such as eternal copyrights or copyrights for non-authors. But such questions do not arise in this case. Here, any arguable conflicts between the CTEA and the Copyright Clause derive from very technical limitations argued to affect the scope of Copyright Clause powers.

For example, the CTEA extends the terms of future and existing copyrights so that the longest would terminate after a period defined by the life of the author plus 70 years. Petitioners *concede* that such a term is constitutional, and that it would not be "meet" for this Court to dispute the propriety of such a term. Br. Pet'rs at 14. Nevertheless, it is argued that the term of *existing* copyrights cannot be extended by 20 years to equal this admittedly constitutional term of life-plus-70 years. *Id.* at 18. Such a 20-year term extension is allegedly not constitutionally "limited" only because more such extensions might be granted in the future. The "limited Times" language of the Copyright Clause is thus argued to draw some sort of constitutional "line" between a term of "life-plus-70 years" and a term of "life-plus-50-plus-20 years." *Id.* at 14. Any "line" drawn between "70" and "50+20" is a technicality at best.

Similarly, Petitioners also advance a very technical argument that extending the terms of existing copyrights to an admittedly constitutional term of "life-plus-70" years would not "promote the progress" of learning and human

knowledge as required by the Copyright Clause. *Id.* at 19-22. Petitioners assert that the requirement for "progress" can be met only if rights are granted in exchange for the production of a new work. Such an argument makes the 200-year-old practice of extending the term of existing copyrights unconstitutional since its origins in 1790.

This argument ignores the text of the Clause—Congress can surely *promote* the progress of learning indirectly, through means other than granting copyrights to newly created works. But even were this "progress" argument valid, it would be technical. Congress has compelling government interests in harmonizing the terms of domestic property rights, harmonizing the terms of domestic and foreign laws, and protecting U.S. exports in foreign commerce. None of these interests conflicts materially with promoting the progress of learning. They are merely argued to exceed the scope of a narrow reading of one word in the Copyright Clause. *See id.*

In summary, all of Petitioners' arguments about CTEA and the Copyright Clause assert that the CTEA technically exceeds some letter of the Clause without violating any of its fundamental principles. Such claims have a simple rebuttal: The Copyright Clause alone does not define the limits of federal legislative power.

Copyrighted content is one of this country's major domestic industries and one of its leading exports. Consequently, the Commerce Clause can sustain any provision of the CTEA that might exceed the scope of the legislative powers granted by the Copyright Clause.

Indeed, nothing in the history of the Copyright Clause itself suggests that it was intended to be the "stopping point" for legislative power advocated by petitioners. Br. Pet'rs at 11, 13. While the history of the Clause is indeed "extremely

limited,"[3] nothing in it shows that the Clause was intended to be the only constitutional basis for Congress' protection of intellectual property rights. Nor did the Framers view the Copyright Clause as the sole means by which Congress may promote the progress of science and the useful arts. As a leading scholar of the Clause put it:

> There is simply nothing to indicate that there was any general intent by the Framers to limit the authority of Congress to promote the progress of science and useful arts to the issuance of limited-term monopolies to authors and inventors. Indeed, no rationale has ever been advanced [as to] why the Framers should have favored such a restriction on congressional authority.[4]

To the contrary, the history of the Clause reflects the Framers' desire "to assure that Congress would *in fact* have authority to issue patents and copyrights *in addition to* whatever other means it saw fit to use to promote the progress of science and useful arts." *Conforming*, *supra* note 4, at 95 (emphasis added). This history shows that far from being a "stopping point" for legislative power, the Copyright Clause was adopted to guard against narrow constructions of the scope of federal legislative powers.

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[3] *Goldstein v. California*, 412 U.S. 546, 555 (1973). In *Goldstein*, the Court sustained the constitutionality of a state statute that provided for copyright protection of recordings without regard to duration. After examining the wording, history and purposes of the Copyright Clause, the Court upheld the concurrent exercise of power by the states to protect copyright rights. *Id.* at 553. *Goldstein* held that the concurrent exercise of state and federal legislative powers relating to copyright comports with the constitutional scheme. Consequently, the concurrent exercise of federal legislative powers under the Copyright and Commerce Clauses should also do no violence to that scheme.

[4] *See Edward C. Walterscheid, Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 Harv. J.L. & Tech. 87, 126 (1999) (hereafter "*Conforming*").

II. THE CTEA CAN BE SUSTAINED AS AN EXERCISE OF LEGISLATIVE POWERS GRANTED BY THE COMMERCE CLAUSE

Two showings are needed to prove that the CTEA can be sustained under the Commerce Clause. First, it must be shown that the Commerce Clause can sustain copyright legislation even though that subject is addressed more specifically in the Copyright Clause. Second, it must be shown that the CTEA exercises powers conferred by the Commerce Clause. Each of these issues will be addressed in turn.

The structure of Article I does not support the notion that the Framers intended to delineate legislative powers that were mutually exclusive and non-overlapping. As this Court observed in *The Legal Tender Cases*, 79 U.S. 457, 544-45 (1870), Congress' "power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive."[5] The structure of the Constitution

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[5] *See also Perpich v. Dep't of Defense*, 496 U.S. 334, 349 (1990) (holding that "the Militia Clauses do not constrain" other enumerated powers relating to national defense); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding under the Commerce Clause civil rights legislation similar to that held to exceed congressional enforcement power under the Fourteenth Amendment); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39 (1943) (holding that Congress could use its commerce power to enact Jones Act remedies unknown to admiralty law); *United States v. Flores*, 289 U.S. 137, 149 (1933) (holding that the Piracies and Felonies Clause "cannot be deemed to be a limitation" on more general legislative powers relating to admiralty); *Baender v. Barnett*, 255 U.S. 224, 226-27 (1921) (holding that the Counterfeiting Clause does not limit congressional power to punish closely related crimes pursuant to more general grants of power) (*citing United States v. Marigold*, 50 U.S. (9 How.) 560, 568 (1850)); *cf. Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 303 (1935) ("[t]he broad and comprehensive national authority over the subjects of revenue,

confirms this conclusion: The third of its three clauses dealing with "direct taxes" would be redundant unless the Framers intended that limitations on grants of legislative power relating to a particular subject would not ordinarily constrain broader grants of legislative powers that might encompass the same subject matter.[6]

The general principle that legislative powers are concurrent and overlapping also applies in the more specific context of intellectual property law. In *Trade-Mark Cases*, this Court first considered the possibility that intellectual property legislation enacted by Congress may be grounded *either* on the Copyright or Commerce Clauses. In that case, although the Court held that a trademark statute providing for criminal sanctions could not be sustained under either clause, it held open the possibility that trademark legislation might be sustained under the Commerce Clause. 100 U.S. 82, 95 (1879). The Court's willingness to consider the Commerce Clause as an alternative constitutional foundation for the statute set an important precedent in discerning whether the constitutional inquiry in this case starts and ends with the Copyright Clause.

More recently, two cases from the Eleventh and Second Circuits applied this principle of concurrent and overlapping legislative power in the particular context of copyright law. They expressly hold that the Copyright and Commerce Clauses provide Congress with coextensive authority to

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finance, and currency is derived from the aggregate of the powers granted to the *Congress*").

[6] *See, e.g.*, U.S. Const. art. I, § 8, cl. 1 (giving Congress broad authority to impose any sort of "taxes"); U.S. Const. art. I, § 2, cl. 3 ("direct taxes shall be apportioned among the several states . . . ."); U.S. Const. art. I, § 9, cl. 4 ("no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.").

enact intellectual property legislation, including laws relating to copyright.

In *The Authors League of America, Inc. v. Oman*, 790 F.2d 220 (2d Cir. 1986), the Second Circuit upheld the constitutionality of the manufacturing clause of the 1976 Copyright Act, which had been part of U.S. copyright law for nearly a century. The manufacturing clause, which has since been eliminated from the federal copyright statute, prohibited the importation into the United States of works manufactured abroad. *Id.* at 221. Rejecting the argument that the constitutionality of the manufacturing clause could only be determined by reference to the Copyright Clause, the Second Circuit concluded that "denial of copyright protection to certain foreign-manufactured works [as a means of protecting the domestic publishing industry] is clearly justified as an exercise of the legislature's power to regulate commerce with foreign nations." *Id.* at 224.

In *United States v. Moghadam*, 175 F.3d 1269, 1275-76 (11th Cir. 1999), the Eleventh Circuit upheld the constitutionality of a federal criminal anti-bootlegging statute under the Commerce Clause. Noting that Congress believed that it had enacted this statute under the Copyright Clause, the court presumed, during its analysis, that the Copyright Clause could not sustain the statute. *Id.* at 1274.[7] The Eleventh Circuit went on to conclude that Congress' desire to protect the domestic recording industry from piracy both here and abroad brought the statute within the bounds of Congress' authority under the Commerce Clause, as defined by this Court in *Lopez*.[8]

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[7] This presumption was based on the supposition that the live performances recorded on disc without authorization did not satisfy the Copyright Clause's "fixation" requirement. *Id.* at 1277.

[8] The court's analysis of whether a Commerce Clause approach would bypass the limitations found in the Copyright Clause is addressed below.

These decisions reveal a judicial receptivity to a flexible constitutional approach that is appropriate here, especially given the foreign commerce interests at stake in the CTEA. They demonstrate that there is nothing inherent in the Copyright Clause that forecloses reliance on the Commerce Clause to sustain legislation that falls squarely within Congress' power to regulate interstate and especially foreign commerce—irrespective of whether the legislation independently survives scrutiny under the Copyright Clause. Whether the CTEA can be sustained under the Commerce Clause is the question to which we now turn.

"[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Though Congress made no specific reference to the Commerce Clause during its consideration of the CTEA, the legislative history contains numerous findings concerning the effect of term extension on the copyright interests of American authors abroad. Furthermore, the legislative history leaves no doubt as to Congress' desire to preserve the favorable balance of trade resulting from the export of U.S. copyrighted products such as motion pictures, sound recordings and books. The legislative history of the CTEA thus firmly establishes the requisite link between term extension and interstate and foreign commerce required by the Commerce Clause. *See Lopez*, 514 U.S. at 559.

The CTEA responded, in part, to a 1993 European Union Directive requiring member countries to extend their copyright terms to life-plus-70 years. Council Directive 93/98, 1993 O.J. (L29019) ("*EU Directive*"), *cited in*, S. Rep. at 4-5. Utilizing a reciprocity-based principle derived from Article 7(8) of the Berne Convention known as the

"rule of the shorter term,"[9] the *EU Directive* permitted countries with longer copyright terms "to limit protection of foreign works to the shorter term of protection granted in the country of origin." S. Rep. at 9. As a result, unless the United States extended its copyright term to life-plus-70 years, U.S. authors and copyright owners faced the prospect of having their works enter the public domain in Europe 20 years before contemporaneous works authored in EU member countries. In Congress' view, this potential disparity put U.S. authors and copyright owners at a decided disadvantage with respect to our EU trading partners and threatened the enormous U.S. surplus balance of trade in copyrighted intellectual property:

> America exports more copyrighted intellectual property than any country in the world, a huge percentage of it to nations of the European Union. In fact, intellectual property is our second largest export, with U.S. copyright industries accounting for roughly $40 billion in foreign sales in 1994 . . . The United States stands to lose a significant part of its international trading advantage if our copyright laws do not keep pace with emerging international standards.

Id. The adverse consequences both to U.S. copyright owners and to our favorable balance of trade in intellectual property of not responding to emerging international copyright standards were starkly clear to Congress:

> Given the mandated application of the "rule of the shorter term" under the *EU Directive*, American works will fall into the public domain 20 years before those of our European trading partners, undercutting our

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[9] *See* Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong., 1st Sess. 209 (1995) (Statement of Ambassador Charlene Barshefsky, Deputy U.S. Trade Rep., Office of the U.S. Trade Rep.).

international trading position and depriving copyright owners of two decades of income they might otherwise have.

Id.; see also Hearing on the Copyright Term Extension Act of 1995, Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. 2 (1995) (Opening Statement of Senator Orrin G. Hatch); H. R. Rep. No. 105-452, at 4 (1998) (hereafter "H. Rep.").

Together with Congress' findings that extension of the copyright term would strengthen incentives to creativity and maximize the return on creative investment,[10] these statements show that the CTEA was not only "substantially related" to foreign commerce concerns, it was driven by them. Under this Court's *Lopez* test, the CTEA easily passes muster under the Commerce Clause and should be upheld.

III. UPHOLDING THE CONSTITUTIONALITY OF THE CTEA UNDER THE COMMERCE CLAUSE WOULD NOT ERADICATE ANY AFFIRMATIVE LIMITATION ON GOVERNMENTAL POWER IMPOSED BY THE COPYRIGHT CLAUSE

As the Eleventh Circuit recognized in *Moghadam*, "[t]he more difficult question in this case is whether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same legislation under the Copyright Clause." 175 F.3d at 1277. After careful analysis, the Eleventh Circuit concluded that sustaining an anti-bootlegging statute under the Commerce Clause would not undermine the Copyright Clause's fixation requirement,[11]

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[10] S. Rep. at 12; H. Rep. at 4.

[11] Because *Moghadam* had not raised the issue, the Eleventh Circuit did not decide whether the anti-bootlegging statute, which was perpetual in duration, was inconsistent with the "limited times" requirement of the Copyright Clause. 175 F.3d at 1281.

and was thus consistent with this Court's decision in *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982). A similar conclusion is warranted here.

In *Railway Labor*, this Court struck down bankruptcy legislation that affected only one particular bankrupt railroad. The Court held that this statute violated the "uniformity" requirement imposed by the Bankruptcy Clause. *Id.* at 468-69.[12] The Court also held that "non-uniform" bankruptcy laws could not be sustained under the Commerce Clause because this would "eradicate" what the Court deemed "an affirmative limitation" on legislative power imposed by the Bankruptcy Clause. *Id.*

But *Railway Labor* is distinguishable here for two related reasons: The principles underlying the Copyright Clause would not be impaired—much less "eradicated"—by the CTEA and the Clause itself was never intended to impose "affirmative limitations" on governmental power.

Most significantly, the CTEA does not "eradicate" the principles underlying the Copyright Clause. In *Railway Labor*, the Court held that a bankruptcy statute "eradicated" the uniformity requirement of the Bankruptcy Clause by effecting the most extreme violation of "uniformity" possible: It imposed huge and unique liabilities on one debtor identified by name. *Id.* at 471.

But ordinarily, invoking the Commerce Clause when foreign and interstate commerce are at issue effects the purposes of the Commerce Clause without "eradicating" any fundamental principles underlying narrower grants of

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[12] The Bankruptcy Clause grants Congress the power to "establish . . . uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4.

legislative power. For example, in *Moghadam*, the Eleventh Circuit held that the Commerce Clause could sustain an anti-bootlegging statute assumed not to satisfy the fixation requirement of the Copyright Clause: "Common sense does not indicate that extending copyright-like protection to a live performance is fundamentally inconsistent with the Copyright Clause." 175 F.3d at 1281.

The CTEA is even more consistent with the principles of the Copyright Clause than the statute sustained in *Moghadam*. Nothing in the CTEA "eradicates" any fundamental principle of the Copyright Clause. Both the text and legislative history of the CTEA confirm that it extends copyrights of authors for a limited and finite term of up to 20 years in order to promote the progress of learning by encouraging the creation of new works. *See, e.g.*, S. Rep. at 12; H. Rep. at 4. Even were the Copyright Clause construed so narrowly as to place the existing-term extension provisions of the CTEA beyond the scope of the Clause, the CTEA would still be consistent with its fundamental principles.

Moreover, this case is also distinguishable from *Railway Labor* because the Copyright Clause does not impose "affirmative limitations" on governmental power akin to those imposed by the "uniformity" requirement of the Bankruptcy Clause. For at least two reasons, the Copyright and Bankruptcy Clauses are fundamentally different in their effects and intent.

First, unlike the Bankruptcy Clause, the Copyright Clause does not impose "affirmative limitations" on government power because it does not bind the states. *E.g.,Goldstein v. California*, 412 U.S. 546, 559 (1973). By contrast, in *Railway Labor*, the Court recognized that the Framer's intent to make uniform bankruptcy laws a constitutional imperative was reflected not only in the Bankruptcy Clause, but also in the Contract Clause that effectively precludes states from

enacting retroactive debt-relief laws. 455 U.S. at 472 n.14. The uniformity requirement thus limited the exercise of the exclusively federal power to enact bankruptcy laws.

Here, in contrast to *Railway Labor*, where "[t]he Framers' intent to achieve uniformity among the Nation's bankruptcy laws" was readily apparent, *id.*, the constitutional structure of the Copyright Clause makes it implausible to assume that a modification of the copyright laws driven by foreign commerce concerns can derive only from powers granted by the Copyright Clause. The Constitution should not be construed to preclude copyright legislation needed to protect U.S. copyright owners abroad and to promote foreign commerce. Indeed, "[a] rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

Second, even as to Congress itself, a leading historian of the Copyright Clause has repeatedly concluded that it was adopted to confirm, rather than restrain, federal power to grant copyrights and patents and that such grants are only one of the means that Congress can use to exercise its power under the Clause. [13] A review of the history of the Clause confirms this analysis.

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[13] *See* Walterscheid, *Conforming*, *supra* note 4, at 125 (concluding that the Clause should be "interpreted to read: 'To promote the progress of science and useful arts [including] by securing for limited times . . .'"); Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective (Part I)*, 83 J. Pat. & Trademark Off. Soc'y 763, 767 (2001) (describing this interpretation as "a major thesis" of his research); *see also Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1988) (holding that the Clause "does not state that the Government may promote the progress of the useful arts only through the patent and copyright system").

The drafting history of the Copyright Clause began when delegates to the Constitutional Convention proposed five legislative powers relating to copyrights or patents:

> To secure to literary authors their copy rights for a limited time; To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries; . . . To grant patents for useful inventions; . . . To secure to authors exclusive rights for a certain time . . . [and] To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures.[14]

These proposals were then submitted to the Convention's Committee on Detail and later referred as unfinished business to the so-called Committee of Eleven. That Committee reported an amalgam of these five proposals that the Convention then adopted without debate. *Conforming*, *supra* note 4, at 92.[15] It is striking that in so doing, the Committee departed from the narrow approach reflected in the Articles of Confederation, where the Continental Congress asked the states to grant copyrights in "any books not *hitherto printed* . . . for a certain time not less than 14 years" without the possibility of renewal.[16]

After the Copyright Clause was adopted by the Convention, it was not controversial. As *The Federalist* put it, "The utility of this power will scarcely be questioned." *The Federalist* No. 43 (James Madison). The powers

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[14] *2 Records of the Federal Convention of 1787*, 321-22 (Max Ferrand ed., 1937) (hereafter "*Records*").

[15] The Committee proposed what became known as the Copyright Clause: "To promote the progress of science and useful arts by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." *Records*, *supra* note 14, at 509.

[16] Resolution of May 2, 1783, *Copyright Enactments of the United States 1783-1906*, 11 (2d ed. 1906) (emphasis added).

granted by the Clause were then broadly construed during the early years of the Republic. Numerous term extensions of patents and copyrights were subsequently enacted by Congresses populated by the Framers,[17] and several of those extensions were upheld by this Court or its justices.[18]

In conclusion, the Copyright Clause was adopted to confirm, rather than restrain, broad federal power to enact copyright legislation. Consequently, it should not be held to impose "affirmative limitations" like those at issue in *Railway Labor*.

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[17] For example, in 1808 Congress extended a patent by 14 years to remedy a governmental error. 6 Stat. 70 (1808). In 1790 and again in 1831, Congress adjusted the terms of then-existing copyrights. *See* 1 Stat. 124 (1790); 4 Stat. 436 (1831). Congress also extended the terms of individual copyrights. *See* 6 Stat. 389 (1828) (extending by 14 years the terms of copyright in a book); 6 Stat. 897 (1843) (extending the same author's copyright by 14 years).

[18] *See Evans v. Jordan*, 13 U.S. (9 Cranch) 199, 202-04 (1815); *Evans v. Eaton*, 16 U.S. (3 Wheat.) 454, 506-07 (1818); *Evans v. Hettich*, 20 U.S. (7 Wheat.) 453 (1822); *Evans v. Robinson*, 8 F. Cas. 886, 888 (C.C. Md. 1813) (No. 4571) (Duval, Circuit Justice); *Blanchard v. Sprague*, 3 F. Cas. 648, 650 (C.C. Mass. 1839) (No. 1518) (Story, Circuit Justice); *Blanchard's Gun-Stock Turning Factory v. Warner*, 3 F. Cas. 653, 657 (C.C. Conn. 1846) (No. 4571) (Nelson, Circuit Justice); *see also Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 543-44 (1852) (listing 15 patent term extensions between 1809 and 1847).

CONCLUSION

For the reasons set forth above, *amicus curiae* Intellectual Property Owners Association respectfully requests that the Court affirm the judgment of the Court of Appeals.

Respectfully submitted.

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ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity
as Attorney General,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF SENATOR ORRIN G. HATCH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the 20-year extension of the terms of all copyrights, set forth in the Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (1998), violates the Copyright Clause of the Constitution.

2. Whether the CTEA's 20-year extension of the terms of all copyrights violates the First Amendment.

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STATEMENT OF INTEREST[1]

Amicus Curiae Orrin G. Hatch is a United States Senator from the State of Utah who was the principal sponsor of the Senate version of the Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (1998), and Chairman of the Senate Judiciary Committee at the time the Act was considered and adopted by the Senate. In addition, he was the Chairman of the Senate-House of Representatives Conference Committee on the CTEA, which crafted the final version of the statute. As former Chairman and now ranking Republican on the Senate Judiciary Committee, Senator Hatch has been a leader in the field of intellectual property law in the United States. He is also a respected legal scholar who has written and spoken extensively in the field of intellectual property law. Senator Hatch's interest in this important case stems from his commitment to the CTEA as well as his experience and expertise in copyright law. As an author of the CTEA and a legal scholar in this field, Senator Hatch is uniquely positioned to identify the evidentiary grounds that led to the enactment of the CTEA and to locate those grounds within the power afforded to Congress in the Copyright Clause of the Constitution.

SUMMARY OF ARGUMENT

At issue in this case is whether the Copyright Term Extension Act is a proper exercise of Congress's authority under the Copyright Clause to "promote the progress of science" by protecting copyrights for "limited times." Congress answered that question in the affirmative roughly

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* or his counsel has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amicus* further states that a letter of consent to file this brief from Respondent has been filed with the Clerk of the Court; Petitioners have filed with the Clerk of the Court a blanket consent letter for all *amici*.

six years ago, based on an extensive evidentiary record and detailed findings. Petitioners would have this Court revisit those findings, exercise plenary review of Congress's determination that the CTEA strikes the proper balance between the various competing interests at issue, and ultimately substitute its own judgment for that of Congress.

For the reasons noted in section I below, this Court should reject Petitioners' request that the Court second-guess Congress, and instead decide this case on the basis of whether Congress acted rationally in concluding that the CTEA is an appropriate response to new challenges in the area of intellectual property. The CTEA clearly survives constitutional scrutiny under this properly deferential standard. As explained in section II, the constitutional goal of "promot[ing] the progress of science" extends not only to establishing incentives for the creation of artistic works, but also to encouraging their dissemination and preservation. Because Congress had before it extensive evidence that copyright extension would have all of these salutary effects, the CTEA must be upheld as a valid exercise of Congress's copyright power. Finally, as set forth in section III, the extension enacted in the CTEA satisfies the "limited times" provision of the Copyright Clause. Petitioners' contrary argument fails as an attempt to replace the ratified language of the Constitution with the more stringent standards that were proposed at the Constitutional Convention but ultimately rejected—standards that would call into question the constitutionality of copyright renewals and extensions dating back to and preceding the founding era.

ARGUMENT

I. THE COURT SHOULD UPHOLD THE CTEA SO LONG AS IT IS RATIONALLY DESIGNED TO "PROMOTE THE PROGRESS OF SCIENCE."

The standard of review implicit in Petitioners' constitutional challenge must be rejected in favor of a more deferential one. As the court of appeals recognized, "the text of the Constitution makes plain" that "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the appropriate public access to their work product." *Eldred* v. *Reno*, 239 F.3d 372, 380 (D.C. Cir. 2001) (quoting *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)). See also *Pennock* v. *Dialogue*, 27 U.S. 1, 16-17 (1829) (Copyright Clause contemplates that "limited times" "period shall be subject to the discretion of Congress").

Because the Constitution allocates the copyright power to Congress—and in so doing calls on Congress to undertake a "task [that] involves a difficult balance" between competing interests, *id.*—this Court has properly accorded a degree of deference to the balance that Congress ultimately strikes. The Court summed up the standard in *Stewart* v. *Abend*, 495 U.S. 207, 230 (1990): "Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces .... It is not our role to alter the delicate balance Congress has labored to achieve."

In recognition of that principle, this Court has consistently accorded substantial deference to Congress under its exercise of the copyright power. In *Graham* v. *John Deere Co.*, for example, the Court explained that "[w]ithin the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which *in its judgment* best effectuates the constitutional aim." 383 U.S. 1, 6 (1966) (emphasis added). Such deference is

particularly appropriate in the field of intellectual property, where Congress continually must respond to changing technologies and markets. See, *e.g.*, *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (noting that the effect of technological innovations on the market for copyrighted materials supports the Court's "consistent deference to Congress").

Deferential review of the CTEA comports not only with the Court's cases under the Copyright Clause, but also with the general rule that "[d]ue respect for the decisions of a coordinate branch of Government demands that [the Court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States* v. *Morrison*, 529 U.S. 598, 607 (2000). It also corresponds to the standard of review applied to legislation enacted pursuant to other Article I powers.

By highlighting the similarities between the Copyright Clause and the Necessary and Proper Clause, for example, Petitioners apparently acknowledge that the CTEA should be reviewed under the same deferential standard. See Pet. Br. 17 ("[T]he *rights* part of the Copyright Clause stands to the *progress* part as the Necessary and Proper Clause stands to the other enumerated powers."). Under the Necessary and Proper Clause, it is well established that so long as the object of federal legislation lies within Congress's delegated powers, the Court defers substantially to Congress's choice of means for achieving that object. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

The Spending Clause provides another helpful analogy. Just as the Copyright Clause authorizes Congress to secure copyrights "[t]o promote the Progress of Science" by granting copyrights of limited duration, U.S. Const. art. I, § 8, cl. 8, the Spending Clause empowers Congress to tax and spend to "provide for the ... general Welfare." *Id.* § 8, cl. 1. In the context of the Spending Clause, the Court has explained that "[i]n considering whether a particular expenditure is intended

to serve general public purposes, courts should defer substantially to the judgment of Congress." *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987); see also *Helvering* v. *Davis*, 301 U.S. 619, 645 (1937) ("[T]he concept of welfare or [its] opposite is shaped by Congress ...."). Thus, while it is true that all legislation enacted pursuant to the Spending Clause is subject to the narrow limitations imposed by the "general welfare" requirement, Congress has broad latitude to define the general welfare, and its judgment in this area is upheld so long as it is rational. *Lyng* v. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360, 373 (1988) ("[T]he discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts.") (citing *Bowen* v. *Owens*, 476 U.S. 340, 345 (1986)).

The same analysis applies under the Copyright Clause. All copyright legislation must "promote the Progress of Science" by "securing [exclusive publication rights] for limited times," but the courts defer to Congress's informed, rational judgment regarding whether a particular statute satisfies that standard. See *Sony*, 464 U.S. at 429; *Pennock*, 27 U.S. at 16-17. There can be no serious dispute that the CTEA is constitutional under that standard.

As explained in greater detail below, Congress conducted hearings and made extensive findings as to the CTEA's consistency with the commands of the Copyright Clause. See *infra* at 18-26. The statute's legislative history makes clear that Congress was well aware that "copyright protection should be for a limited time only" and that "[p]erpetual protection does not benefit society." 144 Cong. Rec. H1458 (daily ed. Mar. 25, 1998) (comments by Rep. Coble). That history further demonstrates that Congress considered the CTEA a reasonable and necessary response to changing demographic trends, evolving international standards, advances in technology, and extended life expectancy. See

S. Rep. No. 104-315, at 10 (1996); 144 Cong. Rec. S12377-78 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch).

Petitioners would have the Court ignore Congress's findings and render its own independent judgment as to whether the copyright terms prescribed by the CTEA are of a sufficiently "limited Time[]," and as to whether they adequately "promote the Progress of Science." Again, that argument must be rejected under the deferential standard that applies under this Court's precedents.[2]

II. CONGRESS REASONABLY CONCLUDED THAT THE CTEA WOULD PROMOTE THE PROGRESS OF SCIENCE.

Petitioners' challenge to the CTEA hinges on a narrow understanding of the constitutional purpose of copyright protection. They assert that copyright protection "'promote[s] the Progress of Science'" only if it can be said to "'stimulate[]' ... 'the creative activity of authors.'" Pet. Br. 22 (first alteration in original). In Petitioners' view, an extension of the copyright term for subsisting works cannot have that effect "because the incentive is being given for work that has already been produced"—"[r]etroactive extensions cannot 'promote' the past." *Id.*

Petitioners' argument may have some superficial appeal. But it fails on closer analysis. Petitioners' myopic conception of the purpose of copyright is contradicted both by the plain

[2] Recognizing that they cannot prevail under the standard applicable here, Petitioners ask this Court to "adopt a rule of heightened review, requiring that any extensions be 'congruent and proportional' to proper Copyright Clause ends." Pet. Br. 31 (citing *City of Boerne* v. *Flores*, 521 U.S. 507, 508 (1997)). For the reasons explained above, however, it is well established that statutes enacted pursuant to the Copyright Clause are reviewed under a standard that is more deferential, and does not require the government to demonstrate that term extensions are "congruent and proportional" to what Petitioners deem "proper Copyright Clause ends." Because Petitioners have offered no persuasive reason why this Court should depart from that precedent, their argument on this point must fail.

language of the constitution and by its consistent application since the time of the First Congress. The historical evidence set forth below demonstrates that the Framers understood that copyright protection "promote[s] the progress of science" not only by providing incentives for the creation of artistic works in the first instance, but also by encouraging authors and publishers to ensure that those works are adequately preserved and distributed to the public.

The CTEA surely survives constitutional scrutiny under this broader understanding of the constitutional purpose of copyright, and even under the narrow understanding advanced by Petitioners. Congress had before it an extensive evidentiary record that demonstrated that the CTEA would promote the progress of science by enhancing incentives for the distribution and preservation of copyrighted works and by encouraging the creation of new works. Petitioners ask the Court to disregard that evidence, and to accept instead their assessment of the wisdom of an extension of the copyright term. That request must be rejected as inconsistent with the language of the Constitution and with the original understanding and historical treatment of copyrights.

A. Copyright Extension Is Consistent With The Founding-Era Notion Of Promoting The Progress Of Science.

Despite Petitioners' unsupported assertion to the contrary, the language and history of the Copyright Clause support a broad understanding of the purpose of copyright protection that extends beyond the incentive for creation of artistic works in the first instance. The starting point, of course, is the language of the Constitution, which empowers Congress "[t]o promote the progress of science" by protecting copyrights. Of these words, the key term is "progress." Everyone agrees that the notion of "science" in the founding era referred generally to all forms of knowledge and learning. See Thomas Sheridan, *A Complete Dictionary of the English Language* (5th ed., 1789), *microformed on* Early American

Imprints 1st Series, Fiche 45588 (Readex Microprint) (defining "science" as "any art or species of knowledge"); John Elliott, *A Selected, Pronouncing and Accented Dictionary* 161 (1800), *microformed on* Early American Imprints 1st Series, Fiche 37356 (Readex Microprint) (defining "science" as "knowledge, skill art"); see also Pet. Br. 15, n.4 (acknowledging this meaning of "science" at the time of the framing). "Promote" is similarly uncontroversial. It meant "to forward" or "to advance." Sheridan, *supra* (defining "promote" as "to forward; to exalt; to prefer"); Elliott, *supra* (defining "promote" as "to forward, advance").

Petitioners' challenge to the CTEA is based on a narrow conception of the term "progress": that of "'advancement; motion forward,'" Pet. Br. 15, n.4—meaning (presumably) an increase in the number or quality of artistic works. Petitioners insist that copyright extensions cannot increase the number or quality of works already in existence, and thus contend that the CTEA does not advance "the ends specified in the *progress* half of the Copyright Clause." *Id.* at 22.

But this narrow meaning cannot be the one intended by the Framers. The founding-era understanding of "progress" clearly extends to the dissemination or distribution of existing artistic works, and is not limited to an increase in quantity or quality. This is clear from the founding-era usage of "progress," from the structure of the Copyright Clause, and from the longstanding history of copyright term extensions.

1. Founding-era dictionary definitions of "progress" focus predominantly on a notion of physical movement or dissemination. Noah Webster's first American dictionary includes a series of definitions of progress, the first two of which clearly connote "a moving or going forward." Noah Webster, *American Dictionary of the English Language* (photo. reprint 1967) (1828). Thomas Sheridan's 1789 definitions similarly encompass "motion forward" and "a journey of state, a circuit." Sheridan, *supra* ; see also William Perry, *The Royal Standard English Dictionary* 413 (1788),

microformed on Early American Imprints 1st Series, Fiche 21385 (Readex Microprint) (defining "progress" as "course; advancement; journey"); Samuel Johnson, *A Dictionary of the English Language* (1773) (defining "progress" as "course; procession; passage" and as "advancement; motion forward").

A full-text search for the term in the electronic version of the Federalist Papers, *available at* http://memory.loc.gov/const/fedquery.html), reveals 24 instances of the word in this important work.[3] The predominant use of the term in the Federalist Papers is in reference to an advancement or movement—as in a physical or metaphorical journey. In No. 15, for example, Alexander Hamilton alludes to "the road" over which his readers "have to pass" and "the field through which [they] have to travel," and indicates his goal "to remove the obstacles from your progress in as compendious a manner as it can be done." And in No. 73, Hamilton refers to the possibility of the King of England thwarting the "progress to the throne" of a "joint resolution[] of the two houses of Parliament" that he may find "disagreeable to him."[4]

Most of the other uses of the term in *The Federalist* also connote physical movement or "spread," often of some mechanism of destruction. In Federalist No. 8, for example, Hamilton speaks of the "rapid desolation which used to mark the progress of war," and of various "impediments" that could "exhaust the strength and delay the progress of an invader."

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[3] The term "progress" appears in Federalist Nos. 1, 2, 5, 6, 7, 8, 9, 15, 16, 18, 22, 26, 30, 34, 40, 41, 43, 56, 58, 63, 73, 79, 84, and 85.

[4] *See also Federalist* No. 5 (discussing the "circumstances which tend to beget and increase power in one part and to impede its progress in another"); *Federalist* No. 79 (speaking of the "progress" over time of the "service" of judges, and their need in the course of that progress for an increase in the "stipend" that would have been "very sufficient at their first appointment"); *Federalist* No. 9 (noting the "progress towards perfection" in government represented by innovations such as separation of powers and checks and balances); *Federalist* No. 40 (identifying the "origin and progress of the experiment" undertaken by the Framers).

Similarly, in Federalist No. 2, John Jay writes of "the progress of hostility and desolation," while Hamilton in No. 34 alludes to a "cloud" that "has been for some time hanging over the European world" that he fears "in its progress a part of its fury would ... be spent upon us." See also Federalist No. 7 (discussing "the progress of the controversy between this State and the district of Vermont"); Federalist No. 18 (noting the "progress" of various tyrants in the Greek empire).

The idea of "progress" as physical movement is also carried forward in the usage of the term in founding-era newspapers and other tracts. In a forthcoming publication, one scholar reports the results of her "full text search of each surviving issue" of the Pennsylvania Gazette ("the New York Times of the American colonies") from the founding era. See Malla Pollack, *What is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution*, 80 Neb. L. Rev. (forthcoming 2002). The results of this search are powerful evidence of the common usage of the term "progress" in the Framers' generation:

> By far, the most common use of "progress" was for destructive physical movement. The single most common word in the phrase "the progress of ..." is "fire." The Gazette speaks of "the progress of a fire" when a modern newspaper would report its "spread."

Id. Similar uses of the term include the progress of armed troops, an illness, insects, bad weather, or hostile ships. *Id.*

The usage of "progress" as a physical dissemination or spread is also indicated by the context surrounding the term as it appears in several State copyright statutes enacted under the Articles of Confederation. The copyright statutes enacted in Massachusetts, New Hampshire, and Rhode Island all begin with a preamble along the following lines: "Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and

ingenious persons in the various arts and sciences ...." An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions, for twenty-one years, Acts and Laws of the Commonwealth of Massachusetts 236 (Mar. 17, 1783), *reprinted in* 8 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* app. 7 § C[2] (1993) (Massachusetts statute of Mar. 17, 1783).[5] In context, the term "progress" as used in these statutes again connotes physical dissemination or spreading—as in the goal of seeing civilization spread (to its manifest destiny) throughout the new world.

The goal of assuring such "progress" was no empty aspiration under the State copyright statutes of this era. Under several such statutes, an author's copyright could be lost if he failed to make sufficient copies of his work available at reasonable prices. *E.g.* 8 Nimmer & Nimmer, *supra*, app. 7-36 § C[11] (Georgia statute of Feb. 3, 1786) ("[W]henever [an] author ... of such book ... shall neglect to furnish the public with sufficient editions thereof, or shall sell the same at a price unreasonable ... the ... court is ... authorized and empowered to give to such complainant [filing against the author] a full and ample license to re-print and

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[5] *See also* An Act for the encouragement of literature and genius, and for securing to authors the exclusive right and benefit of publishing their literary productions, for twenty years, The Perpetual Laws of the State of New-Hamphsire, from July, 1776, to the session in December, 1788, continued into 1789, at 161-62 (1789) *reprinted in* 8 Nimmer & Nimmer, *supra* app. 7 § C[5] (New Hampshire statute of Nov. 7, 1783) (identifying the goals of "the improvement of knowledge, the progress of civilization, and the advancement of human happiness"); An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions for twenty-one years, At the general assembly of the governor and company of the State of Rhode-Island and Providence-Plantations, begun and holden at East-Greenwich on the 4th Monday of December, 1783, at 6-7 (1783) *reprinted in* 8 Nimmer & Nimmer, *supra* app. 7 § C[6] (Rhode Island statute of Dec. 1783) (articulating the goals of "the improvement of knowledge, the progress of civilization, the public weal of the community").

publish such book, pamphlet, map or chart ....") Moreover, many of the State laws spoke of encouraging the publication of works, not their creation. Using essentially the same language, the prefaces of the Connecticut, New Hampshire, Georgia, and New York Acts state that their purpose was to "encourage men of learning and genius to publish their writings." 8 Nimmer & Nimmer, *supra* app. 7 § C[1], [5], [11], [12].

2. The notion of "progress" as a physical dissemination was the predominant usage of the term in the founding era, but it was not the only one. The above-cited dictionaries focused primarily on the idea of movement or a journey, but a couple of them also included the notion of "intellectual improvement." See Sheridan, *supra* ("intellectual improvement"); Johnson, *supra* ("intellectual improvement; advancement in knowledge; proficience"). The same can be said of the usage of the term in the Pennsylvania Gazette and the Federalist Papers: the idea of movement predominated, but "progress" was also used (albeit infrequently) to connote qualitative or quantitative improvement. See Pollack, *supra*; Federalist No. 58 (discussing the impact of "the progress of population" on representation in Congress).

This latter connotation does not advance Petitioners' cause, however. "Intellectual improvement" may be promoted not only by an increase in the number or quality of works, but also by encouraging the broader dissemination of those that already exist. And in any event the CTEA *does* foster the creation of new copyrightable works, for the reasons discussed below. See *infra* at 23-26.

Moreover, the notion of "progress" as an increase in the quantity or quality of artistic works makes no sense in the context of the Copyright Clause—since it makes its words redundant. After all, "promot[ing] ... science and the useful arts" is at least as effective a way to express the idea of increasing the number or character of copyrighted works. See Pollack, *supra* (making the argument that the term "progress"

is surplusage under Petitioners' definition). Thus, if for no other reason, Petitioners' conception of "progress" should be rejected on the ground that it fails to give meaning to all of the words of the Copyright Clause. See *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 77-78 (1946) ("'In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.'") (quoting *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840)).

Moreover, if the Framers had intended to limit Congress to establishing incentives for the creation of artistic works, and to foreclose the goal of promoting their distribution, surely they would not have chosen the broad language of the Copyright Clause. The Framers easily could have followed the language and structure of the British Statute of Anne, which was enacted by Parliament for the express purpose of "the encouragement of learned men to compose and write useful books." 8 Anne c. 19, § 1 (1710) (Eng.). The fact that they chose instead to authorize Congress to "promote the progress of science" suggests that they intended to give broader discretionary authority to take steps aimed at promoting distribution or dissemination—as the predominant usage of the term progress would indicate.

Indeed, at least until 1976, distribution and dissemination (and not creation) were the *exclusive* focus of American copyright law. Until the 1976 Copyright Act, copyright attached not upon creation but only upon publication.[6] For

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[6] The 1976 Copyright Act expanded statutory protection to works previously protected only by the common law: "Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the terms provided by section 302." 17 U.S.C. § 303 (1976). Prior to that change, the Act provided that "nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or equity, to prevent the copying, publication, or use of such

almost two centuries, Congress was focused not on encouraging the initial process of artistic creation, but on providing incentives for publication. See *Feist Publ'ns, Inc.* v. *Rural Tel. Serv. Co.*, 499 U.S. 340, 352-57 (1991) (outlining the changes made by the 1976 Act). Because (as explained in detail below) Congress concluded that the CTEA would advance this same goal, the statute can hardly be invalidated on the ground that it may not affect the initial creative process.

3. Petitioners' conception of "progress" is also undermined by the long history of copyright extensions and renewals in Britain and America. If copyright protection could not extend beyond the term initially promised to the author, the entire history of copyright would be called into question.

American copyright law was patterned after its British counterpart, which was first codified in the Statute of Anne. See 8 Anne, c. 19 (1710) (Eng.). The copyright term under the Statute of Anne was for an initial 14-year term, renewable for an additional 14 years if the author was still living. *Id.* §§ 1, 11. The first American Copyright Act of 1790 followed a similar approach. It conferred an initial term of 14 years, and also provided for a 14-year renewal term—if the author survived (or assigned his rights in the renewal term during the initial period) and filed the necessary renewal papers. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124. Thus, under the Statute of Anne and the first Copyright Act, the copyright term might have been only 14 years, or it might have been extended for a full 28 years, depending on the author's longevity and diligence either in making an assignment or in filing the renewal documents.

Petitioners' challenge to the CTEA cannot be accepted without calling into question this original approach to copyright protection. After all, the author who created an

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unpublished work without his consent, and to obtain damages therefor." Act of Mar. 4, 1909, ch. 320, § 2, 35 Stat. 1075, 1090.

artistic work under the Statute of Anne or the first Copyright Act was assured of a copyright term of only 14 years; by definition, that assurance was a sufficient incentive for the creation of the work in question, and accordingly any extension for an additional term is an unconstitutional windfall—since the "[r]etroactive extension[]" granted by a renewal application "cannot 'promote' the past" and is "for work that has already been produced." Pet. Br. 22.[7]

The extension conferred by the CTEA finds an even closer analogy in another feature of the Copyright Act of 1790, which granted the above-noted copyright term (of 14 or potentially 28 years) to *all* works protected under the copyright laws of the several states. In so doing, the 1790 Act effectively extended the copyright term anticipated by the author at the time his work was created. Because some of the works previously protected under state law would have fallen into the public domain prior to the expiration of the federal term, the 1790 Act had the same effect as the CTEA: it harmonized the copyright term applicable to a broad range of works,[8] and in so doing it forestalled the date on which some of those works would have fallen into the public domain.

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[7] Although the author of a work protected under these statutes was also aware of the possibility of an extension, that fact does not meaningfully distinguish such an author from authors under the pre-CTEA Copyright Act. A modern author might also anticipate the possibility of an extension, particularly where (as here) technological and market changes have led other developed nations to extend the copyright term.

[8] Petitioners insist that the CTEA did not promote harmonization because "[t]here are 76 countries today with a life plus 50 regime but only 26 with life plus 70." Pet. Br. 44. But this misses the point: the CTEA promotes harmonization of the copyright term among the countries that are America's principal trading partners. *See* H.R. Rep. No. 105-452, at 4 (1998) ("Extending copyright term to life of the author plus seventy years means that U.S. works will generally be protected for the same amount of time as works created by European Union authors."); S. Rep. No. 104-315, at 6 (noting "the international movement towards extending copyright protection for an additional 20 years"). And the analogy to the

This effect of the 1790 Act is best seen by a detailed examination of the various state statutes enacted under the Articles of Confederation. Twelve state statutes were enacted in this pre-constitutional period. See 8 Nimmer & Nimmer, *supra* app. 7 § C (setting forth the text of these statutes). Seven of those statutes (Connecticut, Maryland, New Jersey, Pennsylvania, South Carolina, Georgia, and New York) adopted the Statute of Anne approach of a 14-year term renewable for an additional 14 years if the author were still living. *Id.* app. 7 § C[1], [3], [4], [7], [8], [11], [12]. Each of the remaining five statutes authorized a single, non-renewable term of 14 (North Carolina), 20 (New Hampshire), or 21 years (Massachusetts, Rhode Island, and Virginia). *Id.* app. 7 § C[2], [5], [6], [9], [10].

The 1790 Act conferred copyright protection on any and all works created under the above regimes (as well as those created without the "carrot" of any copyright protection at all, as in Maine, or in other states prior to their enactment of a copyright act). It did so by resetting the copyright clock upon the author's registration of the work in question with the clerk of a federal district court. Copyright Act of 1790, ch. 15, §§ 1, 3, 1 Stat. at 124-25. Thus, the first Congress crossed the very line Petitioners claim to be drawn by the Constitution: it granted a retroactive extension for works that had "already been produced" and thus that cannot be "'promote[d]'" by an increase in the copyright term. Pet. Br. 22.

This point can be illustrated by a work like Noah Webster's *American Spelling Book*. This book was initially copyrighted under state law, but the terms available under the state copyright acts were retroactively extended by the Copyright Act of 1790. Specifically, Webster's copyright under the Connecticut Act would have run for 14 years from the date of first publication in 1783. See Noah Webster, *A Gramatical Institite of the English Language* (Hartford 1783); 8 Nimmer

1790 Act again is apt: it harmonized the copyright term among the new States, recognizing that a different term might apply in other countries.

& Nimmer, *supra* app. 7 § C[1] (reproducing the Connecticut statute, which provided for a 14-year term from the date of first publication). Thus, Webster's Connecticut copyright was set to expire in 1797, but the 1790 Act extended it through 1804, and made it renewable until 1818.

Petitioners' construction of the Copyright Clause would have precluded this approach. Webster's book was produced under the promise of a term set to expire in 1797; the extension granted by the 1790 Act could not "'promote' the past," and thus the Act would fail under Petitioners' standard.

The significance of the 1790 Act cannot be avoided by the facile notion that "something had to be done to begin the operation of federal law under the new federal Constitution." *Eldred*, 239 F.3d at 384 (Sentelle, J., dissenting). *Something* had to be done, but that *something* did not have to be an extension that applied to writings already in existence. If Congress doubted its power to enact such an extension, surely it could have enacted federal copyright protection for the period of any remaining copyright term applicable under state law. The fact that it instead adopted a uniformly applicable term postponing the date on which some works would otherwise have fallen into the public domain undermines Petitioners' argument that Congress lacks such power.[9]

Congress has made similar extensions to the copyright term in subsequent iterations of the Copyright Act. Thus, the First Congress and its successors concluded that a retroactive extension does promote the progress of science—by encouraging the dissemination and preservation of existing works. Unless this Court is prepared to set aside the entirety

[9] Petitioners' attempt to dismiss the 1790 extension as a mere "replacement" for state copyrights, Br. Pet. 28, is equally unpersuasive. Whether denominated a "replacement" for existing rights or an "extension," the 1790 Act had the same effect as the CTEA: it lengthened the copyright term that otherwise would have applied to subsisting works.

of copyright protection throughout the history of this country, it should uphold the parallel extension granted in the CTEA.

B. Congress Relied On Evidence That Copyright Extension Would Encourage The Distribution And Preservation Of Subsisting Works.

Petitioners seek to paint the CTEA as a windfall designed by Congress merely to line the pockets of a well-funded lobby of publishers and motion picture producers. Pet. Br. 23 (arguing that the extensions provided by the CTEA are "a windfall, not an incentive"). But the evidentiary record leading up to the enactment of the CTEA includes extensive evidence that copyright extension would promote the progress of science in the ways discussed above: by encouraging the distribution and dissemination of copyrighted works.

1. In the hearings prior to the enactment of the CTEA, a number of witnesses testified that an extension of the copyright term would enhance the dissemination and distribution of copyrighted works. Marybeth Peters, for example, the Register of Copyrights, testified that "[i]n some cases the lack of copyright protection ... restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights." *Copyright Term, Film Labeling, and Film Pres. Legis.: Hearings on H.R. 989, H.R. 1248 and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary,* 104th Cong. 171 (1996) (Statement of Marybeth Peters). In other words, because "the author frequently assigns his right to a publisher, film producer or other disseminator of the work, ... the copyright in the work represents a protection for the investment that is undertaken in the publication or production of the work." *Id.* at 188. If the remaining term on the copyright is not "sufficient to allow the investor time not only to recover but also to earn a reasonable return on his investment," then the work in question will not be published or otherwise disseminated to the consumer. *Id.* In such circumstances, extension of the

copyright term will enhance distribution or dissemination by increasing the "return" on investment in such activity. *Id.*; see also *id.* at 633-34 (Joint Statement of the Coalition of Creators and Copyright Owners) (noting that the "costs of quality production, distribution and advertising, and changing technology, all require a major investment to exploit most works," and that "[f]ew are willing to make such significant expenditures" in the absence of a lengthy copyright term).

Thus, in enacting the CTEA, Congress reasonably concluded that an extension was necessary to create adequate incentives for investment in dissemination throughout any remaining copyright term. Without an extension, the incentive for publishers and other distributors to invest in dissemination could decline toward the end of the copyright term. Thus, the CTEA promotes the progress of science by expanding incentives for disseminating protected works at a time when such works might otherwise fall out of circulation.

2. The evidentiary record before Congress also indicates that the need for a term extension of existing works is especially significant during the current period of conversion to digital media. Congress heard testimony, for example, that extension of copyright protection will "encourage[] industry to make available to the public in new editions, and much finer editions, works which otherwise would have remained moldering in the library." *Id.* at 212. "Although existing copyright protection was apparently adequate to encourage the initial creativity necessary for existing works," Congress perceived a need to extend the terms of "works already in being to encourage investment in those works" to ensure that they would be disseminated in new digital formats. *Id.* at 635 (Joint Statement of the Coalition of Creators and Copyright Owners). In other words, Congress sought to "encourage not only initial creativity, but investment in new technology to maximize the dissemination of older works." *Id.*

Specifically, the record before Congress indicates that certain "works require expensive or labor-intensive main-

tenance, restoration or distribution," and that "continued copyright protection can induce owners to invest in making the work available to the public in high-quality form." *Id.* at 593 (Memorandum from Shira Perlmutter). Because investment in new technology is costly, Congress determined that an extension was an appropriate mechanism for assuring increased dissemination in the digital marketplace. *Id.* (explaining that extension will ensure that "copyright owners will have a greater incentive to take whatever steps may be necessary to disseminate their works in high-quality form if they can retain control over reproduction and distribution," and that the "availability of more works of authorship in superior condition" thus "furthers the progress of science").

3. Technological innovation has also opened up new opportunities for the promotion of the "progress of science" by means of the preservation of existing copyrighted works. Again, the evidentiary record before Congress includes extensive support for the conclusion that copyright extension will increase the incentive for investment in preservation—such as in new digital formats. As Bruce A. Lehman, then Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, testified, "[g]ranting a twenty-year copyright term extension will encourage copyright owners to restore and digitize works that are about to fall into the public domain." *The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Comm. on the Judiciary*, 104th Cong. 26 (1997). "Without a copyright term extension, copyright owners will have little incentive to restore and digitize their works," and "they might deteriorate over time and our children would be unable to enjoy these works as we have." *Id.*; *see also id.* at 42 (Statement of Jack Valenti, President, Motion Picture Association of America) (fearing that "no one ... will invest the funds for enhancement" without "an incentive to rehabilitate and preserve" certain works); *id.* at 115 (Responses to Questions from Senator Brown to Marybeth Peters) (explaining that "many works

may be more readily available to the public, and in better and more usable condition, when they are still protected by copyright," and "[c]opyright protection gives publishers and producers an incentive to invest in the expensive and time-consuming activities that may be required to preserve, update and restore older works.").

In enacting the CTEA, Congress embraced this and other evidence of the positive effects of copyright extension on dissemination and preservation. Senator Hatch, for example, endorsed the evidence of improved incentives for dissemination and preservation in digital formats:

> Many works which are now preserved in perishable media, such as film or analog tape recordings, could be more permanently preserved—and more widely disseminated—in digital formats, using emerging technology. But if we want the substantial investment in digitizing these works to be made, we must choose to either have the taxpayer fund investment in public domain works or to give private parties the incentive to invest by allowing them to recoup their investment. Extending the copyright for an additional two decades can provide this incentive for private funds to be invested in the preservation of artworks important to the American cultural heritage.

Id. at 3 (Opening Statement of Senator Hatch). The Senate and House Reports confirm that the statute's enactment rested in part on the observation that "[t]he digital revolution ... offers exciting possibilities for storage and dissemination of [copyrighted] works," S. Rep. No. 104-315, at 13, and on the understanding that the CTEA would create incentives for the use of new technology and thereby promote the dissemination and preservation of copyrighted material. See also H.R. Rep. No. 105-452, at 4 (1998) (CTEA will "provide copyright owners generally with the incentive to restore older works and further disseminate them to the public.").

Congress's findings cannot be set aside on the ground offered by Petitioners—that extensions will postpone the date on which third parties may begin disseminating and preserving works that have fallen into the public domain. See Pet. Br. at 3 (noting the effect of the CTEA on "individuals and businesses that rely upon speech in the public domain for their creative work and livelihood"). Congress found that the CTEA would increase the availability of artistic works by enhancing the incentive for investments in distribution and preservation. Neither Petitioners nor the courts are in any position to insist that this goal would have been better served by erasing those incentives and relying on the public domain.

In any event, Petitioners' assessment of this balance can be accepted without questioning Congress's decision to extend the copyright term. Even if extensions were thought to dampen dissemination at the time the work was set to fall into the public domain, that possibility would only underscore another tradeoff considered by Congress: extension might increase dissemination during an earlier period leading up to expiration of the term, but might decrease dissemination during a later period after the term otherwise would have expired.[10]

Ultimately, Congress was called upon to strike the difficult balance between these possibly competing considerations. In so doing, it heard evidence that candidly acknowledged that the optimal balance was "very difficult to estimate" and may

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[10] Marybeth Peters, Register of Copyrights, summed up the tradeoff in her testimony to Congress: "The ultimate question is not whether the public domain has value, since all works will eventually fall into the public domain. It is instead whether the value to the public of works falling into the public domain 20 years earlier outweighs the value of the incentives provided by an additional 20 years of copyright." *The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Comm. on the Judiciary*, 104th Cong. 115 (1997) (Responses to Questions from Senator Brown to Marybeth Peters). This is the type of tradeoff whose resolution the Framers delegated to Congress.

vary over time for "different types of works and individual works within different genres." *Copyright Term, Film Labeling, and Film Pres. Legis.: Hearings on H.R. 989, H.R. 1248 and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary*, 104th Cong. 188 (1996) (Statement of Marybeth Peters). Petitioners may not agree with the balance arrived at by Congress, but that balance is for Congress to strike, not the courts.

C. Congress Also Relied On Evidence That Copyright Extension Would Encourage The Creation Of New Works.

Although copyright extensions promote the "progress of science" by encouraging the dissemination and preservation of existing works, the CTEA also advances the goals identified in the Copyright Clause by enhancing incentives for the creation of copyrighted works in the first instance. It does so by maintaining Congress's longstanding tradition of periodically revising the copyright term to (1) maintain its consistency with international standards, and (2) ensure that copyright holders are able adequately to capitalize on the fruits of their labors.

As explained in detail above, copyrighted works are created against the backdrop of a longstanding congressional practice of periodically reviewing and revising the copyright term. The first Copyright Act extended the term of subsisting works already protected under state copyright laws, Act of May 31, 1790, ch. 15, § 1, 1 Stat. at 124, and subsequent statutes have extended the copyright term for works created under federal law, see Act of Feb. 3, 1831, ch. 16, §§ 1-3, 4 Stat. 436, 436-37; Act of Mar. 4, 1909, ch. 320, § 24, 35 Stat. 1075, 1075-78; Act of Oct. 19, 1976, Pub. L. No. 94-553, §§ 302-304, 90 Stat. 2541, 2572-76. With each extension, Congress reacted to changes in the market for literary and other works of authorship, making adjustments intended to assure a fair return on the investment made by the author.

The CTEA simply followed this tradition. In extending the copyright term, Congress was simply recognizing that the changing global marketplace merited a somewhat longer period of protection than was warranted in an earlier era. See S. Rep. No. 104-315, at 6 ("In the 20 years since the passage of the 1976 Copyright Act, developments on both the domestic and international fronts have led to further consideration of the sufficiency of the life-plus-50 term."); 144 Cong. Rec. S11673 (daily ed. Oct. 7, 1998) ("In the global world of the next century, competition in the realm of intellectual property will reach a ferocity even more ruthless than it is today.") (comments of Sen. Leahy).

Contrary to Petitioners' argument, this extension was not a naked windfall to copyright holders. Rather, it fulfilled the justified expectation that Congress will periodically review and revise the copyright period. In so doing, Congress not only confirmed the expectation of existing copyright holders; it also preserved its ongoing good faith in the eyes of the authors of new copyrighted works. Such an extension accordingly does advance the goal of enhancing the incentive for the creation of new copyrighted works.

Indeed, Congress had before it an extensive evidentiary record that supported the conclusion that an extension would improve incentives for creation of copyrighted works. As one witness explained:

> Granting a copyright term extension ... would provide copyright owners with an additional twenty years in which to exploit their works. The additional twenty years will enable copyright owners to increase the exposure of their works. This would result in greater financial rewards for the authors of the works, which will in turn, encourage these authors to create more new works for the public to enjoy.

Hearings on H.R. 989, H.R. 1248 and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the Comm. on

the Judiciary, 104th Cong. 219 (1996) (Statement of Bruce A. Lehman, Commissioner of Patents and Trademarks). In other words, as the Register of Copyrights testified, "The public benefits not only from an author's original work but also from his or her further creations. Although this truism may be illustrated in many ways, one of the best examples is Noah Webster, who supported his entire family from earnings on his speller and grammar during the twenty years he took to complete his dictionary." *Id.* at 165 (Statement of Marybeth Peters,); see also *id.* at 109 (Statement of Martha Coolidge, Member, Directors Guild of America, Inc.) ("Cycling more money through the system through an extended copyright term will help insure future production."); *id.* at 583 (Letter from Paul Goldstein to Jack J. Valenti, Motion Picture Association of America) ("By increasing the value of their libraries overall, term extension can give them revenues to produce new films during the extension period. Further, companies are more likely to invest resources in creating sequels or remakes of existing works if they know that the expiration of the copyright in the original work is more than twenty years in the future. If a work is about to fall into the public domain there is much less incentive to make a derivative work since any rights in underlying works will soon become—in effect—non-exclusive.").

And again, Congress clearly intended to advance this objective in enacting the CTEA. The statute's legislative history indicates Congress's view that "a creative work is of legitimate proprietary interest to the families of the authors," and makes clear that the CTEA was enacted "for the purpose of giving creators an incentive to advance knowledge and culture by allowing them to reap the economic benefit of their creations for 'limited times.'" S. Rep. No. 104-315, at 10. The CTEA accomplishes that purpose by "protect[ing] the author and at least one generation of heirs"—an outcome which, according to testimony presented to Congress, could not have been achieved under pre-existing laws. *Id.* at 10-11.

In enacting the CTEA, Congress also "sought to ensure that creators are afforded ample opportunity to exploit their works throughout the course of the works' marketable lives, thus maximizing the return on creative investment and strengthening incentives to creativity." *Id.* at 12. "'Technological developments clearly have extended the commercial life of copyrighted works.'" *Id.*

At a minimum, Congress acted rationally in accepting this evidence of the CTEA's positive effects on the "progress of science" and in rejecting the contrary position espoused by Petitioners. This Court should defer to Congress's balancing of the competing considerations at issue and uphold the constitutionality of the CTEA.

III. THE COPYRIGHT TERM EXTENDED BY THE CTEA IS FOR "LIMITED TIMES."

Refuting a straw man of their own creation, Petitioners devote a substantial portion of their brief to the unremarkable proposition that Article I prohibits Congress from granting perpetual copyrights. See Pet. Br. 11-17. In so doing, Petitioners suggest that the mere existence of that limitation mandates reversal in this case, and that the decision below rests on the assumption that "the Copyright Clause grants Congress effectively unbounded authority." *Id.* at 11. In particular, Petitioners argue that the "limited times" language in the Copyright Clause prohibits not only perpetual copyrights, but also extensions of copyrights already in existence. This argument fails because it disregards the language of the Copyright Clause, the historical context in which that provision came into existence, and Congress's longstanding practice of extending subsisting copyrights.

1. The copyright protection extended by the CTEA is of limited duration and is entirely consistent with the "limited times" language in the Copyright Clause. As Petitioners acknowledge, a term is limited if it is confined within limits, "such that it is not 'le[ft] at large.'" *Id.* at 17 (quoting Samuel

Johnson, *A Dictionary of the English Language* (W. Strahan 1755)). Under this definition, there can be no doubt that the terms prescribed by the CTEA are "limited." Far from leaving those terms unsettled or "at large," the CTEA prescribes a specific, fixed term for every copyrighted work.

Petitioners nevertheless contend that the CTEA violates the "limited times" requirement in extending the terms of pre-existing copyrights—terms that were set to expire at a specific time prescribed by a previous act of Congress. *Id.* at 18. In other words, they argue that the copyright power may be exercised once, and only once, with respect to a particular work, and must be exercised in such a way that each work will pass into the public domain on a specific date prescribed by laws in effect at the time of its initial publication.

Petitioners offer no textual support for this novel theory. Nor can they—the Copyright Clause broadly empowers Congress to grant copyright protection for "limited times," and is utterly devoid of any language capable of supporting such a sweeping limitation. Instead, Petitioners rely on hyperbole, threatening that a decision upholding the CTEA would effectively authorize Congress to create "a perpetual term 'on the installment plan'" by enacting successive (but limited) term extensions "ad infinitum." *Id.*

Petitioners' concerns are unfounded. There is nothing in the record suggesting that the CTEA is the product of a multi-generational conspiracy within Congress to create a perpetual copyright term. Quite to the contrary, the record (quoted in detail above) is replete with evidence that the CTEA is the product of Congress's rational judgment that the limited term extensions authorized by that statute were a useful means of promoting the progress of science—particularly in light of recent developments in technology, changing demographic trends, and evolving international copyright standards.

The fact that Congress *could* at some point attempt to circumvent the "limited times" requirement is irrelevant. If

Petitioners' "speculation comes to pass," and Congress attempts to circumvent the constitutional limits on its copyright power, "the Court can address the problem at that time." *Utah* v. *Evans*, 122 S. Ct. 2191, 2203 (2002). In the meantime, however, the relevant inquiry is whether Congress has exceeded its authority here, which it plainly has not.

Nor can it be said that there is no "practical stopping point" to Congress's power once the authority to grant extensions is recognized. Pet. Br. 13. Granted, the subjective line between a permissible extension and one that effectively circumvents the "limited times" standard is difficult to draw in the abstract. But wherever that line may be, the CTEA clearly falls on the constitutional side of it.

An extension that continues Congress's longstanding practice of bringing the American copyright term in line with the emerging international standard is surely constitutional—particularly where (as here) it is consistent with an approach that was proposed before the founding era. More than 300 years ago, philosopher John Locke proposed that "for those who purchase copies from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author ... as, suppose, fifty or seventy years." John Locke, *Memorandum 208-209* (circa 1694), *quoted in* Mark Rose, *Authors and Owners: The Invention of Copyright* 33 (1993). That standard—which is consistent with the term prescribed by the CTEA—is as reasonable today as it was 300 years ago. Congress's decision to embrace it should therefore be upheld.

2. Petitioners' construction of the "limited times" provision is further undermined by the alternative language that was proposed but rejected by the Framers. As Petitioners acknowledge, Charles Pinckney of South Carolina originally proposed that Congress be authorized to grant copyright protection for "'a certain time.'" Pet. Br. 17 (citing 3 *Documentary History of the Constitution of the United States* 556 (Dep't of State 1900) (Convention, Aug. 18, 1787)). The

Framers' rejection of this provision in favor of the "limited times" language suggests an intent to give Congress *more* discretion in deciding whether to extend a copyright term.

In context, the word "certain" connotes a sense of exactness and precision not associated with the word "limited." Compare 1 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "certain" as "resolved" or "determined") with 2 *id.* (definin "limit[ed]" as "restrain[ed]," "circumscribe[d]," or "not le[ft] at large"); see also Sheridan, *supra* (defining "certain" as "determined" or "limit[ed]" as "restrain[ed]" or "circumscribe[d]"); Perry, *supra* at 139, 324 (defining "certain" as "sure" or "resolved" and "limit[ed]" as "confine[d] within bounds"). Thus, the fact that the Framers adopted the word "limited" instead of "certain" suggests that although the temporal limitations on a particular copyright must be fixed by statute, Congress need not ascertain at the outset a specific date after which the owner's rights may not be enforced. Congress may extend the copyright term so long as each extension is limited in duration and reasonably promotes the progress of science.

The Framers' adoption of the plural "limited *times*" is also significant—particularly in contrast to James Madison's original proposal to authorize exclusive rights for "a limited time." 2 *Records of the Federal Convention of 1787*, at 321 (Max Farrand ed., 1911) (Convention, Aug. 18, 1787). A fixed copyright term that is subsequently renewed or extended for an additional finite period is easily consistent with the notion of "limited times" even if it might fail under the stricter standard of a "limited time." Indeed, at least one scholar has suggested that the very purpose of this change in language was to make clear that extensions were permissible. See George Ramsey, *The Historical Background of Patents*, 18 J. Pat. Off. Soc'y 6, 14 (1936).

3. Petitioners' "limited times" argument also fails for the additional reason that it ignores the historical context in which the Copyright Clause came into existence. In

particular, Petitioners' argument ignores strong historical evidence that the Framers knew how to draft language prohibiting Congress from extending existing copyrights, but declined to do so. For example, the Statute of Anne—which, as Petitioners point out, was the first legislation prohibiting perpetual copyrights—limited new copyrights to two consecutive terms of "fourteen years ... *and no longer.*" 8 Anne, ch. 19, §§ 1, 11 (1710) (Eng.) (emphasis added). The Framers could have imposed a similar qualification on Congress's copyright authority, but chose not to.

Indeed, in August 1789, Thomas Jefferson, apparently displeased with the language adopted by the Framers, proposed to James Madison a provision in the pending Bill of Rights that: "Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding—years *but for no longer term* and no other purpose." Letter from Thomas Jefferson, to James Madison (Aug. 28, 1789), *reprinted in* 1 *The Republic of Letters* 630 (James M. Smith ed., 1995) (emphasis added). Again, the Framers could have included such language in the Constitution. Their failure to do so leaves Congress free to decide whether to extend the terms of existing copyrights.

4. Finally, Petitioners' argument ignores the fact that, since the first copyright statute was enacted in 1790, Congress has repeatedly extended the terms of existing copyrights. See *supra* at 14-18. As explained above, the history of such extensions provides persuasive support for the conclusion that an extension of the copyright term that applies retrospectively to subsisting works is entirely consistent with textual limitations on Congress's copyright authority. See *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 57 (1884).

CONCLUSION

For all these reasons and those in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
in his official capacity as Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* RECORDING INDUSTRY ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Recording Industry Association of America ("RIAA") is a trade group representing the American music recording industry. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA's members create, manufacture and/or distribute approximately 90 percent of all legitimate sound recordings produced and sold in the United States.

Two core components of the RIAA's mission are central to this case: protecting the First Amendment freedom of artists and defending the rights of intellectual property owners. As creators and distributors of artistic works – works that are sometimes controversial – RIAA's members are dedicated to opposing censorship in any form. RIAA's members are also vitally interested in intellectual property rights. RIAA's members hold many copyrights to sound recordings. At the same time, RIAA's members must obtain licenses to use copyrighted works in their sound recordings, including licenses to use the underlying musical composition performed in a sound recording and licenses to use existing sound recordings that are "sampled" in new recordings.

As entities that are both copyright holders and licensees, RIAA's members have a very strong interest in ensuring that the standard that the Court employs to resolve this case respects the unique institutional competence of Congress to balance the interests of copyright owners, licensees, and the public when it formulates copyright law. Indeed, given recent rapid technological advances and the use of such technologies to foil the rights of copyright holders, Congress's role in protecting copyright by enacting new laws to

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[1] This brief is filed with the consent of the parties, as indicated by letters filed with the Court. No party authored this brief in whole or in part and no one, other than *amicus curiae*, its members, or its counsel monetarily contributed to the preparation or submission of this brief.

adjust to the changing and increasingly complex battle between copyright and piracy has never been more important.

SUMMARY OF ARGUMENT

Petitioners purport merely to challenge extensions of pre-existing copyrights in the Copyright Term Extension Act ("CTEA").[2] Their arguments, however, go far beyond that narrow issue. If adopted, the aggressive standards of review urged by Petitioners would require this Court to sit as a "superlegislature," second-guessing Congress's every policy judgment concerning the length, scope, and other characteristics of copyright protection. The Judiciary would be embroiled in the balancing of competing policies and values that is properly the business of the political branches. The resulting weakening of copyright protections would pave the way for piracy of artistic works after copyright holders have invested the very substantial time and money necessary to create, promote, and disseminate those works to the American public.

The First Amendment's bulwark against censorship does not require heightened scrutiny of copyright laws. Copyright is itself an engine of free expression. Therefore, it would be entirely inappropriate to presume that First Amendment values weigh against copyright protection. To be sure, it would violate the First Amendment if Congress used copyright law to censor disfavored speech. But, as Petitioners concede, the law at issue here is content-neutral. And absent censorship of specific speech, the fact that copyright affects speech cannot justify any heightened scrutiny.

Strong copyright protection furthers the First Amendment interests of artists and the public by providing an incentive to create, disseminate, and promote original artistic works – and a corresponding disincentive against merely copying existing works. Petitioners completely ignore those First Amendment interests. They focus solely on the interests of those who want to *copy* existing works created and popularized by others – with no compensation to the author (or the author's heirs or other assignees). The idea/expression dichotomy and fair use defense ensure that copyright does not prevent anyone from expressing their ideas in their own words, or even from appropriating copyrighted material to the extent necessary for a genuinely transformative or critical work. In short, strong First Amendment interests favor strong copyright laws, and the First Amendment should not tip the constitutional scale against such laws.

Petitioners' arguments concerning the interpretation of the Copyright Clause, U.S. Const. art. I, § 8, cl. 8, also fail. Nothing in the preamble to the Copyright Clause compels the courts to test copyright laws against Petitioners' favored economic theories or extremely limited view of what constitutes progress in art, music, and literature. Petitioners assume that the only permissible purpose of copyright is to provide a barely sufficient incentive to authors to *create* works. Yet, as this Court has recognized, fair compensation to authors is also a legitimate concern of copyright law. Just as importantly, the need for incentives to "promote the Progress of Science" does not end the moment a work is created. There must also be incentives to disseminate the work and market it so that it comes to the public's attention. Given that the cultural marketplace is global, harmonizing international copyright law is also a legitimate goal that Congress may pursue. Extending the terms of preexisting copyrights reasonably furthers all these ends. The Court should not accept Petitioners' invitation to substitute its own judgments for those of Congress concerning the best way to achieve these diverse goals.

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[2] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) ("CTEA").

Finally, the distinctive history of copyrights for sound recordings refutes Petitioners' oversimplified assumptions about copyright law and the CTEA in particular. That history demonstrates that, if Congress in 1790 had wanted to create a uniform system of copyright for future works, but leave only the state law protections in place for existing works, it could have done so – just as Congress did in 1972 with respect to sound recordings. That the first Congress chose to apply the new federal copyright term to existing works shows that, in the eyes of the Framers, neither the Copyright Clause nor the First Amendment prohibits the extension of new copyright protection to pre-existing works. That understanding by the Framers is fatal to Petitioners' case. Moreover, with respect to many sound recordings (those created prior to 1972), the CTEA does not give authors rights beyond those that existed when the recordings were created; rather, it restores rights that existed at creation but were subsequently stripped away. Thus, Petitioners' arguments have no applicability to the CTEA as it applies to many sound recordings.

ARGUMENT

I. BECAUSE COPYRIGHT IS AN ENGINE OF FREE EXPRESSION, COPYRIGHT LAWS ARE NOT PRESUMPTIVELY SUSPECT OR SUBJECT TO HEIGHTENED SCRUTINY UNDER THE FIRST AMENDMENT.

A. The First Amendment Should Not Tip the Scales Against Copyright Protection, Which Is Critical to Ensuring a Vibrant Marketplace of Ideas.

The RIAA and its members are dedicated defenders of the First Amendment and vigorously oppose government-sponsored censorship in all its forms. Far from promoting

censorship, however, generally applicable copyright laws promote free expression and a vibrant marketplace of ideas. For that reason, heightened First Amendment scrutiny should not apply to copyright legislation such as the CTEA.

The Copyright Clause is unique among the Constitution's grants of power to Congress and, indeed, unique among all provisions of the Constitution. Unlike every other constitutional provision, the Copyright Clause expressly and specifically gives Congress the power to legislate concerning *speech*, "by securing for limited Times to *authors* . . . the exclusive Right to their respective *Writings* . . . ." U.S. Const. art. I, § 8, cl. 8 (emphasis added). Thus, copyright legislation is unlike laws affecting speech enacted under other constitutional provisions, such as the Commerce Clause or the Necessary and Proper Clause. The Framers fully intended Congress to legislate concerning speech under the Copyright Clause – to grant "authors" exclusive rights and thereby to exclude others from copying those writings without permission. And the Framers stated in the Constitution why they gave Congress this specific power, but not other powers, to legislate concerning speech: because such legislation will "promote the Progress of Science." *Id.* As this Court has observed, "the Framers intended copyright itself to be the engine of free expression." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

Thus, the Copyright Clause has a complementary relationship to the Free Speech Clause of the First Amendment, in that the Framers addressed both Clauses to the same subject (legislation affecting speech) for the same purpose (ensuring free expression). This relationship between the two Clauses strongly suggests that modes of First Amendment analysis that are appropriate to legislation enacted under other constitutional provisions are misdirected when applied to copyright legislation. In other contexts, heightened First Amendment scrutiny is applied to every "regulation of

speech": strict scrutiny if the regulation is content-based, and intermediate scrutiny if it is content-neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Although intermediate scrutiny allows more leeway for regulation than does strict scrutiny, even intermediate scrutiny imposes a substantial burden on the government to justify regulations of speech. *See id.* In effect, the "thumb" of the First Amendment is placed on the constitutional scale against such regulation. But that bias against regulation of speech, entirely proper elsewhere, is not justified in the context of copyright protection. Because the Framers saw copyright as "the engine of free expression," it would be wrong to presume that copyright legislation *defeats* free expression or is in any way suspect under the First Amendment.

Thus, neither this Court nor the lower courts have ever applied the First Amendment "levels of scrutiny" framework to copyright laws. Instead, courts have recognized that copyright law dovetails with the First Amendment both to promote free expression and to balance the expressive interests of authors and the public against the expressive interests of would-be copiers. In particular, two structural features of copyright law ensure that it does not evolve from an "engine" into an impediment of free expression: the definitional distinction between protectible expression and unprotectible ideas (and facts), and the fair use defense. *See, e.g., Harper & Row*, 471 U.S. at 560-61. As long as copyright law incorporates these structural features, Congress's policy judgments concerning the optimal duration and other aspects of copyright protection are presumptively valid and not subject to heightened scrutiny under the First Amendment.

To be sure, the First Amendment bars government from censoring not only ideas, but also specific expressions of ideas. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971). Obviously, Congress could not ban a particular sound recording with "incendiary" or "shocking" lyrics, even if the

underlying ideas could be expressed in other forms. Nor could Congress achieve the same result through copyright legislation that singled out the recording for special treatment to hinder its dissemination. *Cf. United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152 (D.C. Cir. 1987) (striking down, under Establishment Clause, law giving one church group special extended copyright in specific canonical work to prevent dissenting group from disseminating work); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (striking down "Son of Sam Law" that imposed content-based burden on speech by requiring that the author's income from certain publications be paid to crime victims). Thus, if a copyright law singled out disfavored speakers or speech, the law could be subject to heightened First Amendment scrutiny.[3]

Petitioners concede, however, that the CTEA does not single out any viewpoint or subject matter for more or less favorable treatment. Pet. Br. 37. The threat of censorship of specific disfavored speech is therefore absent here. In this context, the distinction between copyrightable expressions and uncopyrightable ideas ensures that copyright remains the engine of, rather than an obstacle to, free expression. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) ("copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work").

In promoting free expression, copyright protection balances the First Amendment interests of authors, copiers, and the public. Copyright is essential to protecting the First Amendment interests of authors. By granting an "author"

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[3] To the extent that the opinion of the Court of Appeals is inconsistent with this point, its language suggesting that the idea/expression distinction renders "copyrights . . . categorically immune from challenges under the First Amendment," *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001), goes too far.

exclusive rights to his original "writings," copyright creates a strong economic incentive for the creation and dissemination of original works, an incentive which is critical to a free and robust "marketplace of ideas." Indeed, the Court has recognized that taking away this incentive can be tantamount to the suppression of ideas. *Simon & Schuster*, 502 U.S. at 118 (applying strict scrutiny to "financial disincentive to create or publish works with a particular content"). In addition, copyright protection enables authors to determine when and how their original expression is disseminated to the public. Again, the Court has rightly recognized that speakers have a very strong First Amendment interest in controlling their own message. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Harper & Row*, 471 U.S. at 559-60, 564. In short, there are strong First Amendment interests favoring copyright protection, which counsel forcefully against treating such protection as suspect or in need of heightened scrutiny.

Petitioners ignore the First Amendment interests of the author and dwell exclusively on those of the copier. But, in the absence of a license, copyright merely restricts the copier's ability to duplicate the author's original expression – it does not prohibit the copier from expressing any idea in his or her own music, words, or images. Indeed, the copyright in a sound recording bars only the literal copying of the "actual sounds fixed in the recording," not the independent reproduction of the very same musical sound (say, by another orchestra recording the same symphony). 17 U.S.C. § 114(b).[4] That is no limitation on the copier's freedom of expression, but only on his ability to appropriate the fruit of someone else's creativity and labor without paying for it.

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[4] If the underlying "musical work," or composition, is itself copyrighted, reproduction of the same sounds may require a license for that work, which is subject to a copyright distinct from that of the sound recording.

To be sure, there may be certain occasions when quoting limited portions of an author's expression – even reproducing limited "samples" of the "actual sounds" fixed in a sound recording – is necessary for creation of a new "transformative" work, such as a legitimate parody. But in those instances, the fair use defense prevents copyright from "'stifl[ing] the very creativity the law was intended to foster.'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)). For example, the fair use defense almost certainly shields a critical and transformative work like *The Wind Done Gone* from infringing the copyright on *Gone With the Wind*. *See SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).[5] Thus, "*copyright does not immunize a work from comment and criticism.*" *Id.* at 1265 (emphasis in original). The fair use defense "serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity." Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).

Even when copying does not constitute fair use, the copier may still obtain a license to use the protected work. In the world of sound recordings, there is an extremely large and active market for such licenses, including licenses for "samples" that are incorporated into new works. *See generally* Al Kohn & Bob Kohn, *The Art of Music Licensing* (1992). There is no reason why the copier should be relieved of the obligation to pay for appropriating another's expression. "Artists, no matter how great, must pay for what they

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[5] Petitioners misleadingly cite *SunTrust* as if it supported their contention that copyright law is in tension with the First Amendment. Pet. Br. 18. In fact, in *SunTrust* the Eleventh Circuit *vacated* a preliminary injunction against publication of *The Wind Done Gone* because the plaintiff's infringement suit was very unlikely to succeed in the face of the fair use defense's applicability.

use in making their works. They pay for paint, for canvas, for steel, for clay, for a model's time. Why should they not also pay a reasonable fee for the use of another artist's works as part of a new work?" Pierre N. Leval, Campbell v. Acuff-Rose: *Justice Souter's Rescue of Fair Use*, 13 Cardozo Arts & Ent. L.J. 19, 24 (1994).

From the foregoing, it follows that copyright protection also serves the First Amendment interests of the listening, reading, and viewing public. Copyright is a critical engine of free expression because it gives authors an incentive to create, publish, and disseminate original works for the benefit of the public. "Holding an infringer liable in copyright for copying the expression of another author's ideas does not impede First Amendment goals because the public purpose has been served – the public already has access to the idea or the concepts." *SunTrust*, 268 F.3d at 1264. Indeed, because copyright creates an economic *disincentive* simply to copy pre-existing works, copyright law further redounds to the benefit of the public by disfavoring mere reproduction in favor of creation of something original.

In sum, First Amendment interests favor strong copyright protections. It makes no sense to say that copyright laws should be presumed suspect simply because they affect speech. One could just as easily support the opposite proposition: laws that affect speech by *diminishing* copyright protection should be treated as suspect under the First Amendment, especially in light of the powerful ways in which copyright protection furthers the First Amendment interests of speakers and the public. But neither position is correct: the adjustment of copyright protections should be left to the policy and predictive judgments of Congress, without the thumb of the First Amendment being placed on either side of the scale, whether favoring greater or lesser protection.

B. Heightened Scrutiny Would Embroil the Court in Ad Hoc Policymaking About Every Aspect of Copyright Law.

Petitioners' rhetoric masks what they are asking for: the right to copy – jot for jot – the works of others, often in order to profit economically, without having to pay a licensing fee that recognizes the copyright holder's contribution in creating and popularizing the work. Thus, in many cases what Petitioners seek is not to create new works or add to the universe of ideas and expression available to the public. They seek merely to profit off works created by others that are already publicly available.

Nor is their effort to undermine copyright protection limited to this case. Indeed, much of what Petitioners and their *amici* complain about has nothing to do with copyright term extensions, but concerns other aspects of copyright law with which they disagree. For example, Petitioners complain that the first sale doctrine does not permit them to copy protected works and disseminate them on the Internet without compensating the author in any way. Pet. Br. 5-6, 38. Yet, the great advantage of the Internet – unparalleled speed and ease of communication – has also created an unparalleled threat of piracy that severely weakens traditional copyright protections. Over the Internet, a single digital copy of a work can be instantaneously disseminated to the world for downloading. *See, e.g., Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 314-15 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001). Copyright piracy in the music business alone exceeds $4 billion annually, with most of the loss being absorbed by U.S. copyright holders. *2002 IFPI Music Piracy Report* at 1 (2002) (worldwide loss due to piracy $4.3 billion annually). Congress needs the flexibility to meet this threat effectively. In the area of sound recordings, for example, Congress has created a compulsory license available to

"webcasters" that transmit copyrighted recordings over the Internet, subject to certain conditions designed to hinder both copying and on-demand performances that could substitute for copies. *See* 17 U.S.C. § 114(d)(2). That compulsory license reduces transaction costs for webcasters while ensuring that the creator of a recording obtains compensation for the use of his or her work.

Nowhere do Petitioners explain why the First Amendment standard they propose should apply to copyright extensions, but not other generally applicable, content-neutral copyright laws. That is because they can find no principled rationale for limiting their extreme argument. Indeed, adoption of their proposed standard of review would wholly undermine Congress's ability to facilitate the use of new technologies for disseminating works while at the same time battling copyright piracy. Petitioners advocate a fact-intensive examination of every detail of copyright law under the standard applied in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), to determine whether Congress has struck the optimal balance for promoting expression. Under their argument, a decision by Congress to make the maximum copyright term 28 years (as the first Congress did) would be invalid unless an evidentiary record could be compiled showing that that term was better than 27 years. Similarly, courts would have to take evidence to determine whether the various conditions for a compulsory webcasting license are unduly restrictive, *e.g.*, must an archived program be at least five hours in duration to preclude a determination that it is an on-demand service, as Congress provided, 17 U.S.C. § 114(d)(2)(C)(iii)(I), or would four hours be sufficient? Simply posing these questions makes clear that Congress, not the Judiciary, is the body that must make such judgments.

Finally, Petitioners' proposed standard would draw both Congress and the courts into exactly the kind of content-based determinations the First Amendment forbids. At times, Petitioners appear to argue that the CTEA is unconstitutional because Congress did not limit the extension of additional copyright protection only to specific works, *e.g.*, films that still have economic value. *E.g.*, Pet Br. 45. In other words, copyright protection should be based on the value and character of *each particular work*. But in addition to being entirely unworkable, any such *content-specific* evaluation of copyright would raise serious First Amendment concerns. The conditions for obtaining copyright protection necessarily are, and have always been, general in character, without regard to whether a particular copyrightable work would have been created even without such protection.

II. UNDER THE COPYRIGHT CLAUSE, CONGRESS'S BALANCING OF DIVERSE INTERESTS AND POLICIES MUST BE RESPECTED.

Petitioners' Copyright Clause arguments suffer from the same flaws as their First Amendment arguments. Their interpretation of the Copyright Clause would narrowly cabin Congress's power to enact laws that respond to the dynamically changing world of copyright and would force the Judiciary to second-guess judgments that are quintessentially legislative in character.

Petitioners concede that Congress must have latitude to determine the duration of copyright terms under the "limited Times" language of the Copyright Clause (Pet. Br. at 14), but contend that, because of the preamble to the Copyright Clause ("To promote the Progress of Science"), any legislation enacted under the Clause must comport with Petitioners' own view of economic incentives, which recognizes only those incentives known by the author at the moment of creation. Nothing in the preamble of the Copyright Clause, however, suggests such drastic limitations on the authority of Congress. Rather, the Copyright Clause gives Congress broad power to enact legislation that, in its view, promotes

the arts and sciences by, among other things, fairly compensating authors for the fruits of their labors and furthering the harmonization of international copyright law.

A. The Rapidly Changing World of Copyright Requires Constant Adjustment to Ensure a Fair Return to Authors and a Vibrant Marketplace of Ideas for the Public.

Petitioners' narrow view of Congress's power under the Copyright Clause derives from an extremely simplistic model of copyright in which the only important step is the creation of a discrete work by a lone author. Based on that simplistic model, they argue that the only incentive needed for progress is one held out to the lone author at the moment of creation. The reality is much more complicated.

To begin with, the copyright system has always been intended to foster not only creation of works, but also publication, distribution, and promotion of those works. Indeed, prior to 1976, unpublished works were given no federal copyright protection at all. Moreover, neither "publication," as it was understood in pre-1976 copyright law, nor the mere release of a new work into "the public domain" is enough to make a book or recording available to the public in any but the most technical sense. For that reason, the Framers intended the Copyright Clause to give Congress the power to encourage the *dissemination* of works as well. *See Harper & Row*, 471 U.S. at 558 ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and *disseminate* ideas") (emphasis added); *Stewart v. Abend*, 495 U.S. 207, 228 (1990) ("dissemination of creative works is a goal of the Copyright Act"); *Mills Music Inc. v. Snyder*, 469 U.S. 153, 187 (1985) (White J. dissenting) ("promoting public access to the arts . . . requires providing incentives both to the creation of works of art and to their dissemination"). Dissemination occurs not in the

lonely studio, but rather in the public marketplace, where larger and more complex economic forces are at play.

Bringing a creative work to the public requires production, marketing, and distribution, all of which require money. While digital technologies have made distribution (both legal and illegal) of some types of works easier, people still buy books, CDs, and DVDs. Thus, the works must be available in quantity (production), the public must know about them (marketing), and the public must be able to obtain them (distribution). Not surprisingly, many copyrighted works are created or disseminated by corporations. Those organizations, including RIAA's members, invest not only in the initial creation, but in all of the subsequent activities that bring the work to the public. Copyright law must necessarily extend to and encourage all of these activities, without which the copyright system would not be an engine of free expression.

Petitioners also fail to recognize that the copyright system exists against a dynamic backdrop, where the assumptions that underlie the last generation's copyright law – whether the life expectancy of authors, the commercial life of works, the technology that can be used to disseminate works, or the ease of piracy – can become quickly outmoded. If Congress could do nothing to protect the value of existing copyrights from the changing methods of those who would pirate copyrighted works, the *quid pro quo* that Petitioners claim the Copyright Clause offers to authors would mean very little; the "fair" return to authors in exchange for their creation would be lost to the ever-growing technological sophistication of copyright pirates.

Thus, virtually every important piece of copyright legislation in this Nation's history has been motivated by the need to respond to technological changes that have made copying easier and threatened the value of existing copyrights. "From its beginning, the law of copyright has devel-

oped in response to significant changes in technology. . . . Repeatedly, as new developments have occurred in this country, it has been Congress that has fashioned new rules that new technology made necessary." *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 430-31 (1984) (footnote omitted); *see, e.g.*, Act of Mar. 4, 1909, Pub L. No. 60-349, 35 Stat. 1075 (giving musical work copyright owners control over mechanical reproductions).[6]

Finally, as has long been understood, copyright is not a purely domestic enterprise. The copyright extension granted in 1831 was passed "chiefly" to harmonize the term for domestic copyrights with those of authors abroad. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 650-51 (1943) (discussing legislative history of 1831 act). For much of the last century, debate in Congress has concerned harmonizing U.S. law with the Berne Convention for the Protection of Literary and Artistic Works, which originally sought a uniform international standard for copyright of life plus 50 years. With the increasingly global economy and the development of technologies that enable a thief in virtually any country to disseminate a pirated work worldwide with a single keystroke, international cooperation and the harmonization of international copyright law has never been more important. To be able to realize the commercial value of a work, a copyright owner, whether it be a lone author or a corporation, must live in a world where the international legal framework ensures a fair opportunity to obtain a return on one's creative efforts.

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[6] *See also Sony Corp.*, 464 U.S. at 431 ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology").

Congress must weigh all of these factors when it legislates under the Copyright Clause. It thus should be no surprise that Congress has created a complex web of laws that seek a balance between fairness to the author and fairness to the public. The methods Congress has used to strike that balance have varied: extending copyright protection for existing works to a new medium (as Congress has done repeatedly through the years, including the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336); creating new and more effective enforcement mechanisms to protect the rights of copyright holders from new forms of piracy (as Congress did in the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998)); extending copyright terms to recognize changes in the world since the creation of those works (as Congress did in the CTEA); requiring compulsory licenses, which are intended to ensure a fair return to authors and dissemination to the public, *see, e.g.*, 17 U.S.C. § 114(d)(2) (compulsory license for webcasting); 17 U.S.C. § 115 (compulsory license for making and distributing phonorecords); making exceptions for non-profit entities or educational institutions, such as libraries and archives, *see, e.g.*, 17 U.S.C. § 108. But the goal has always been the same – to be fair to authors by ensuring them a reasonable return on their efforts and to be fair to the public that benefits from a vibrant marketplace of ideas.

Striking the optimal balance among all of these complex concerns is plainly beyond the institutional competence of the Judiciary. Indeed, the Court has repeatedly recognized that it is Congress's job to make such decisions:

> As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate ac-

> cess to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.

Sony Corp., 464 U.S. at 429; *Stewart*, 495 U.S. at 230 ("[The] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to 'secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings.' . . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve") (internal citation omitted).

Petitioners, however, would re-assign that constitutionally defined role to the Judiciary, forcing the courts to test every adjustment to copyright laws against the particular economic theory favored by Petitioners. Relying on cases like *United States v. Lopez*, 514 U.S. 549 (1995), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), Petitioners contend that the CTEA is similarly beyond Congress's authority. But that comparison does not withstand even minimal scrutiny. In *Lopez*, the Court held that Congress was seeking virtually unlimited power at the expense of the States by means of the Commerce Clause. In *City of Boerne*, the Court held that Congress was seeking to dictate the results of cases and the interpretation of the Constitution, at the expense of both the Judiciary and the States. By contrast, there is no conceivable threat to the constitutional plan through an exercise of Congress's authority under the Copyright Clause, such as the CTEA. Regardless of how one interprets its introductory language, the Copyright Clause is limited to granting exclusive rights in works to their authors for "limited times." As

Petitioners here concede, there is no doubt that Congress has the authority to establish the duration of copyright terms. Pet. Br. at 14 (conceding that whether 50 or 70 years is enough protection "is not a judgment meet for this Court"). Petitioners' *only* argument is that Congress should not have the ability to adjust those terms as circumstances change. Thus, this case in no way presents the institutional and federalism issues raised by *Lopez* and *City of Boerne*.

Ultimately, Petitioners' theory would strip Congress of a power that the Framers intended Congress to have – the power under the Copyright Clause to balance all of the myriad factors involved in promoting a vibrant marketplace of ideas that is both fair to authors and fair to the public. Congress concluded that the CTEA would be most fair to both creators and the public domain and would advance the interests of the United States worldwide. S. Rep. No. 104-315, at 1 (1996) ("Senate Report"). That conclusion – the right one – should not be second-guessed here.

B. In Enacting Copyright Legislation, Congress May Consider More than the Narrow Economic Theory Advanced by Petitioners.

In crafting copyright laws, Congress may take into account policies other than the narrow set of economic incentives recognized by Petitioners. Even accepting the preamble of the Copyright Clause as a limitation, its language – "To promote the Progress of Science and useful Arts" – does not dictate a single, narrow economic theory. To the contrary, the language broadly gives power to Congress to take steps it believes will advance progress.

To begin with, this Court has recognized that fair compensation of authors is a proper policy consideration for copyright legislation. *Stewart*, 495 U.S. at 229 ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors") (internal

quotation marks and citation omitted). Adjusting the terms of pre-existing copyrights is one way that Congress can choose to ensure that authors continue to receive a fair return on their creative efforts. Thus, where Congress finds that creative works continue to have economic value beyond the old term or that the old term does not provide sufficient compensation to the heirs of authors due to altered patterns of childbearing and changes in life-expectancy, Congress could reasonably determine that an extension is necessary to keep the original bargain with the author. Those are exactly the findings Congress made here. *See* Senate Report at 10 (finding that the terms established by the 1976 Act were "increasingly inadequate to protect some works for even one generation of heirs as parents are living longer and having children later in life"); *id.* at 11 (extension appropriate "[i]n order to reflect more accurately Congress' intent and the expectation of America's creators that the copyright term will provide protection for the lifetime of the author and at least one generation of heirs"); *id.* at 12 ("the likelihood that a work will remain profitable beyond the current term of copyright protection has increased significantly").[7]

Similarly, Congress could fairly judge – as it did – that harmonizing copyright terms with Europe and other countries would promote progress by simplifying the world of international copyright and by ensuring full protection for U.S. copyright holders abroad. In 1976, Congress concluded that copyright harmonization was necessary because

> the disparity in the duration of copyright has provoked considerable resentment and some proposals for retaliatory legislation. Copyrighted works move across national boundaries faster and more easily than virtually any other economic commodity . . . . The need to conform the duration of U.S. copyright to that prevalent in the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings.

[7] Similar findings formed part of the basis of the Copyright Act of 1976. *See* H. Rep. No. 94-1476, at 135 (1976) (noting the "striking statistical increase in life expectancy since 1909"); *id.* at 134 (explaining that "[t]he tremendous growth in communications media has substantially lengthened the commercial life of a great many works").

See H.R. Rep. No. 94-1476, at 135 (1976).[8] Given technological advances over the last two decades, it is hardly surprising that Congress re-affirmed in the CTEA the importance of international cooperation – led by the United States:

> Uniformity of copyright laws is enormously important to facilitate the free flow of copyrighted works between markets and to ensure the greatest possible exploitation of the commercial value of these works in world markets for the benefit of U.S. copyright owners and their dependents. Indeed, in an age where the information superhighway offers widespread distribution of copyrighted works to almost anywhere in the world at limited costs, harmonization of copyright laws is imperative to the international protection of those works and to the assurance of their continued availability.

[8] Petitioners concede that harmonization of *domestic* copyright protection by the first Congress was a permissible policy consideration under the Copyright Clause and justified extending existing copyright protection, Pet. Br. at 29. That position is wholly at odds with Petitioners' claim that *international* harmonization cannot be considered by Congress when legislating under the Copyright Clause. Given the nature of the global economy today, the benefits of international harmonization are strikingly similar to the benefits that the Framers saw in having a uniform national system of copyright. *See, e.g.*, The Federalist No. 43 (Madison).

Senate Report at 8.

Thus, Congress reasonably concluded that the CTEA was a significant step in the effort to harmonize copyright protection in an information technology world that is increasingly without boundaries. Petitioners do not actually quarrel with this notion. Rather, they intone their narrow view of the Copyright Clause and then claim that the CTEA does not fully harmonize copyright terms. But the latter argument is merely a disagreement with Congress over the effects of the CTEA and its importance in promoting international harmonization. This Court should decline the invitation to second-guess Congress's judgment in this matter.

C. Even If One Accepted Petitioners' Incorrect Reading of the Copyright Clause, Congress's Policy Judgments Embodied in the CTEA Are Reasonable and Consistent with the Policies Underlying the Clause.

Even if Petitioners' view of the Copyright Clause were correct, the CTEA would still pass muster. The incentive effects of copyright law – and Congress's judgments in this area – are far more complex than Petitioners acknowledge. The CTEA gives holders of existing copyrights incentives to create derivative works and to disseminate existing works. Moreover, the CTEA creates incentives for those in the future who may create totally new works – in exactly the narrow manner Petitioners claim is permissible – by giving them assurance that the fruits of their labors will be fairly rewarded by the copyright system.

In an effort to suggest that the CTEA creates no incentives, Petitioners describe the CTEA's extension of copyright as "retroactive." Although it affects pre-existing works, the CTEA is not, properly speaking, retroactive. It does not, for example, remove U.S. works currently in the public domain, as this Court suggested is prohibited in *Graham v.*

John Deere Co., 383 U.S. 1 (1966) (dictum). Rather, the CTEA is "secondarily retroactive" because it alters the *future* legal effect of past decisions (rather than the *past* legal effect of past decisions). *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring). Because the CTEA changes legal consequences in the future, it does affect current behavior and thus can affect current incentives.

By extending the scope of future legal rights, the Act induces a current copyright holder to disseminate copyrighted and derivative works more broadly than if there were no extension. For example, a copyright holder considering re-releasing a work whose copyright is about to expire faces an economic choice. Re-releasing a work entails fixed costs of marketing, production, and distribution. Without the extension, another company can wait to see if the re-release is a hit and, if so, issue a similar re-release with confidence it will sell. In such a scenario, the first company takes the risk and pays the cost of determining and stimulating demand; the second company merely poaches off the first company's expenditures. Congress recognized this in 1976 when it extended copyright terms:

> Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's expense. In some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.

H.R. Rep. No. 94-1476, at 134-35 (1976).

The same incentives apply with respect to creation of derivative works, which this Court has recognized is an important part of the incentive to create original works in the first place. *See Harper & Row*, 471 U.S. at 568 ("market for derivative works" is valuable and worthy of protection); *Campbell*, 510 U.S. at 593 ("the licensing of derivatives is an important economic incentive to the creation of originals"). A decision to digitally re-master a recording or motion picture whose copyright is due to expire soon is an economic gamble about consumer demand. Without a copyright extension, the original owner or licensee may simply not take the gamble because, even if the re-mastered version is a popular success, any economic benefit would be eroded by competing firms free-riding on the original owner's efforts.

Similarly, a record company with a catalog of well-regarded classical or jazz recordings may find that marketing and releasing new high-quality recordings actually stimulates sales of its older recordings. The new recordings burnish the image of their brand; in fact, new recordings may be *required* to maintain brand presence in the current marketplace. An extension of copyright for these older recordings will increase the benefit of releasing new recordings – thus providing a current incentive to keep creating. More generally, control over derivative works is critical to the effective use of a brand or creative franchise, such as a series of novels or a series of CDs that advance a particular theme. If anyone were free to copy such works – with no single copyright holder to ensure quality – the entire enterprise would soon lose its reputation. In the end, without copyright, no one would be willing to produce additional works in a series, because no one would be willing to buy items of dubious quality.

Petitioners also fail to recognize the broader positive incentive effects established by a *flexible*, rather than a rigid, copyright power. This Court has recognized that "[r]etroactivity provisions often serve entirely benign and legiti-

mate purposes" – including "to correct mistakes . . . or simply to give comprehensive effect to a new law Congress considers salutary." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267-68 (1994). A creator who believes that Congress has power to revise copyright terms will form a different set of expectations than one who believes that terms are set in stone. Incentives to create are significantly enhanced if creators understand that Congress can adjust copyright terms based on, among other things, fairness to authors, or the impact of changing technology on the fair value of copyrights (such as unforeseen decreases in the value of copyright based on new forms of piracy, etc.). Indeed, several artists testified that the belief that the copyright system would ensure fair compensation for themselves and their heirs was an incentive to create. *See, e.g., Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. (Sept. 20, 1995) (Statement of Carlos Santana), *available at* 1995 WL 557183; *Copyright Term Extension Act of 1995: Hearings on H.R. 989 Before the House Comm. on the Judiciary, Courts, and Intellectual Property*, 104th Cong. (July 13, 1995) (Statement of Bob Dylan), *available at* 1995 WL 418349; *id.* (Statement of Quincy Jones), *available at* 1995 WL 418350.

III. THE DISTINCTIVE HISTORY OF COPYRIGHTS FOR SOUND RECORDINGS ILLUSTRATES THE OVERSIMPLIFIED CHARACTER OF PETITIONERS' THEORIES.

Petitioners' simplistic approach is also refuted by the distinctive history and character of federal copyright protection for sound recordings. Prior to 1972, sound recordings as such did not enjoy federal copyright protection. Federal law thus did not prohibit "record piracy," or the making and selling of copies of sound recordings created by someone else. *See, e.g., Goldstein v. California*, 412 U.S. 546 (1973); *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657

(2d Cir. 1955). That void in federal legislation was filled by state statutes and common law. For example, California prohibited the unauthorized copying and sale of sound recordings, and that protection against unauthorized copying under California law lasted "for an unlimited time." *Goldstein*, 412 U.S. at 550 (upholding California statute against challenge under Copyright and Supremacy Clauses).[9]

Congress filled this gap in federal law by giving *federal* copyright protection to sound recordings for the first time beginning on February 15, 1972. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391; *Goldstein*, 412 U.S. at 552. In enacting that legislation, "Congress was spurred to action by the growth in record piracy, which was, in turn, due partly to technological advances," 412 U.S. at 562 n.17 – advances analogous to, though vastly less sophisticated than, the digital revolution of today. However, the new federal protection for sound recordings applied only to those recordings made, or "fixed," after the effective date of the new act, February 15, 1972. Pub. L. No. 92-140, § 3, 85 Stat. at 392; *see* 17 U.S.C. § 301(c). Thus, state laws protecting sound recordings, such as the California statute upheld in *Goldstein*, remained in full force and effect with respect to recordings fixed before 1972 – including many or all of the recordings

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[9] In *Goldstein*, this Court acknowledged Congress's power to address copyright protection for pre-existing works, including extending copyright protection to such works. *Id.* at 571 (noting that the California statute would remain the sole protection for pre-1972 sound recordings "[u]ntil and unless Congress takes further action with respect to" such recordings). Similarly, in *Mills Music*, the Court defined the rights of an author and subsequent licensees that were created by the 1976 Act and did not exist at the time of the creation of the work. The Court noted, without concern, that the copyright term would have been extinct, but for the 1976 Act, and that Congress had given authors new rights, which did not exist when the work was created, to protect authors who were unable to profit from works that became valuable long after they were created. *Mills Music*, 469 U.S. at 172-73.

created by artists such as Billie Holiday, Vladimir Horowitz, Miles Davis, Frank Sinatra, the Beatles, Louis Armstrong, and Elvis Presley.

That overall approach to protection of sound recordings – state protection for pre-1972 recordings and federal protection for later recordings – was retained in the general overhaul of federal copyright laws in 1976, with one significant exception. Under many state laws, such as California's, pre-1972 sound recordings enjoyed *perpetual* protection. In 1976, Congress determined that such protection under state law for pre-1972 recordings should be limited in duration, and the 1976 Copyright Act therefore preempted such state laws effective February 15, 2047, at which time the recordings would pass into the public domain. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2572. In other words, the 1976 Act *cut short* the perpetual term of protection given to pre-1972 recordings when they were created. The CTEA amended that provision by extending the date for preemption of state-law protections for pre-1972 recordings by 20 years, to February 15, 2067. CTEA, § 102(a), 112 Stat. at 2827, *codified at* 17 U.S.C. § 301(c).

This history is significant in two ways. First, it refutes Petitioners' oversimplified characterization of the CTEA as extending the duration of the copyright protection enjoyed by works when they were created. In fact, when pre-1972 sound recordings were created, they enjoyed *perpetual* protection under many state laws. In 1976 Congress cut that perpetual protection short. Against that background, CTEA merely *restores* (in part) the protection that pre-1972 recordings were to receive when they were created – protections that, on Petitioners' own theory, were part of the incentive for the recordings' creation, or the *quid pro quo* for their release to the public. Thus, the basic premise behind Petitioners' arguments has no applicability as it applies to pre-1972 sound recordings, because the statute did not extend

the original term of protection for those recordings. CTEA is therefore plainly constitutional as it applies to pre-1972 sound recordings, even on Petitioners' own theories.[10]

Second, Congress's extension of federal copyright protection to sound recordings in 1972 highlights the fallacy in Petitioners' attempt to distinguish the 1790 copyright extension. In 1972, Congress had to decide how to create a federal law of copyright for sound recordings when there already existed state-law protection for the same works in many States. The First Congress faced exactly this situation, but with respect to books, charts, and maps.

Prior to 1790, every State but Delaware had legislation giving copyright protection to authors. *See* Copyright Office, *Copyright Enactments, 1783-1900*, at 9-29 (Gov't Printing Office 1900). In several States, however, that protection lasted less than 28 years, and in no State was it longer than 28 years (including renewal years). *Id.* North Carolina had a copyright term of 14 years, *id.* at 23; New Hampshire 20 years, *id.* at 16; Rhode Island and Virginia 21 years, *id.* at 17, 22; and, of course Delaware, with no copyright law, provided protection for zero years. When Congress enacted the first federal copyright law in 1790, it *extended* the original terms of the state-law copyrights enjoyed by *pre-existing* works – *i.e.*, "any map, chart, book or books *already printed* within these United States" – to a total of 28 years. Act of May 31, 1790, 1 Stat. 124, § 1 (emphasis added) (providing for 14-year initial term plus 14-year renewal term). Moreover, the new federal copyright term of 28 years ran from the time the pre-existing work was registered in accordance with the new federal law. *Id.* In other words, Congress extended to authors of existing works a new 28-year copyright, regard-

[10] In the extremely unlikely event that CTEA were held unconstitutional, the Court should make clear that CTEA is constitutional as it applies to pre-1972 sound recordings.

less of when the work had previously been published or how long its remaining term of copyright was under state law.

That 1790 Act was the first of several copyright term extensions applicable to pre-existing works, stretching over 200 years from the Nation's Founding to the enactment of the CTEA in 1998. *See* Br. *Amicus Curiae* of Motion Picture Association of America, Section I.A.2. This unbroken history is fatal to Petitioners' arguments:

> The construction placed upon the constitution by the first act of 1790 . . . by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly [two] centur[ies], it is almost conclusive.

Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884).

Recognizing that the 1790 Act is particularly fatal to their argument, Petitioners attempt to distinguish that law.[11] But to no avail. According to Petitioners, the extension of pre-existing copyright terms by the first Congress was necessitated by the unique context of the transition from a state-law regime to a unified national system. Pet. Br. 28-30. But Congress's treatment of pre-existing state-law copyrights for sound recordings in 1972 demonstrates that creating a unified

[11] Petitioners also concede that accepting their argument would render several other Acts of Congress throughout the nineteenth and twentieth centuries suspect. Pet. Br. 30. Petitioners make a weak attempt to distinguish those prior enactments from the CTEA based on the registration requirements in the earlier laws, Pet. Br. 30 n.13, but that distinction obviously provides no defense to their First Amendment and Copyright Clause arguments against retroactivity.

national system of copyright in no way necessitates the extension or alteration of the copyright terms applicable to already published works under state law. Just as it did with pre-existing sound recordings in 1972, in 1790 Congress could have made federal copyrights available to new works, while leaving the protections of state law in place for pre-existing works. Nothing in the Copyright Clause eliminated the States' power to grant copyrights or required Congress to preempt existing state laws. *Goldstein*, 412 U.S. at 560. Moreover, even if Congress had wanted to supplant state law entirely, doing so did not necessitate giving authors of pre-existing works longer copyright terms than they enjoyed at the time they created their works. The first Congress could have made the term of federal copyrights for pre-existing works the same as the remaining term under any state-law copyright covering that work. But it chose not to do so.

In short, the first Congress's choice to extend the terms of existing copyrights was in no way necessary to a unified national regime. Rather, as the title of the 1790 Act indicates, the purpose of that retroactive extension was "the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies." Act of May 31, 1790, 1 Stat. at 124. Thus, the first Congress, like the Congress that enacted the CTEA, recognized – contrary to the economic theory Petitioners would have this Court constitutionalize – that incentives for the dissemination of existing works, and not just incentives for the creation of new works, serve the "encouragement of learning" and are well within Congress's powers under the Copyright Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the New York Intellectual Property Law Association ("NYIPLA") — an association of more than 1,500 attorneys whose interest and practice lies in the areas of patent, copyright, trademark, trade secret and other intellectual property law.[1] Unlike attorneys in many other areas of practice, NYIPLA members, whether in private practice or employed by corporations, typically represent both plaintiffs and defendants in litigation. NYIPLA members also regularly participate in proceedings in the Patent and Trademark Office, including representing parties in interferences, as well as representing applicants for patents.

Since its founding in 1922, the NYIPLA has been committed to maintaining the integrity of United States patent and copyright laws, and to the proper application of those laws. In furtherance of these goals, the NYIPLA requests that the Court consider the potential ramifications of its ruling on the patent law and reject Petitioners' broadest argument that any extension of the term of an existing intellectual property right is unconstitutional.

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1. Pursuant to SUP. CT. R. 37.6, the NYIPLA represents that it has authored this brief in whole, and that no person or entity other than the *amicus* and its counsel have made a monetary contribution to the preparation or submission of the brief. The parties to this case have consented to the filing of this brief. The consent of the Respondent is lodged herewith and the written consent of the Petitioner has been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

An interpretation of the Constitution which bars Congress from extending the terms of existing copyrights would have the destructive effect of casting a cloud over existing patents whose terms have been extended by Congress. Throughout history, Congress has exercised the power to amend patent terms through private and public laws. Congress has granted extensions to compensate patentees who are unfairly prejudiced by delays at the United States Patent and Trademark Office ("PTO") and the Food and Drug Administration ("FDA"), and, in doing so, has provided incentives for further research and development. Congress has also amended the national patent term so that it would coincide with the corresponding patent terms of the international community, thus encouraging trade and harmonizing similar intellectual property rights. Whether the congressional purpose has been to give patentees the full benefits of their rights or align the laws of the United States with those of other industrialized countries, the patent system in the United States has been improved by term extension legislation enacted by Congress.

ARGUMENT

I.

THE ISSUES PRESENTED EQUALLY IMPACT PATENT LAWS

Congress' power to enact copyright law derives from Article I, Section 8, Clause 8 of the Constitution. Congress is empowered "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The court below found that Congress did not exceed the "limited Times" requirement of Article 1, Section 8, Clause 8 of the Constitution, by extending the duration of copyrights. One question upon which this Court has granted certiorari is whether the lower court erred in holding that an extension of the term of an existing copyright is a proper exercise of Congressional power. Petitioners have argued that the phrase "limited Times" should be interpreted in light of the preamble of the Copyright Clause, that is "To promote the Progress of Science and useful Arts. . . ." According to the Petitioners' broadest argument, any extension of the term of an existing copyright is unconstitutional because it does not "promote the Progress of Science" within the meaning of the Copyright Clause and also violates the clause's *quid pro quo* requirement. (*E.g.*, Brf. for Petitioners, p. 10.)

Petitioners' arguments as to the interpretation of these phrases in the Constitution will likewise apply to patents, since the identical phrases apply to both the patent and

copyright provisions.[2] *See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 122 S. Ct. 1889, 1895 (2002) (construing a statutory phrase so as to give it a single, consistent meaning). A broad holding that Congress is unauthorized to extend the term of an existing copyright would therefore threaten the validity of analogous and salutary patent term extension legislation.

II.

THE INABILITY OF CONGRESS TO MODIFY PATENT TERMS HAS THE POTENTIAL TO INTERFERE WITH INTERNATIONAL TREATIES AND DEVALUE UNITED STATES PATENTS

One drastic effect of a holding that intellectual property term extensions are unconstitutional can be seen by examining Congress' response to the Uruguay Round Agreements Act.[3] In order to harmonize certain aspects of the United States patent system with corresponding provisions of international systems, Congress amended the patent term statute such that the term of a utility patent is now measured 20 years from the date of filing an application as opposed to the prior 17 years from grant.[4] This amendment

2. *See* Edward C. Walterscheid, *The Remarkable — and Irrational — Disparity Between the Patent Term and the Copyright Term*, 83 J. Pat. & Trademark Off. Soc'y 233, 247 (2001) ("Both the introductory language of the clause and the phrase 'the exclusive right' serve to limit or qualify the authority of Congress to set the term of both patents and copyrights.").

3. Pub. L. No. 103-465, 108 Stat. 4809 (1994), *amending* 35 U.S.C. § 154.

4. 35 U.S.C. §§ 154(a)(2), (c)(1) (2001).

extended the term for any existing patent if the grant was less than three years from filing. Under the new law, approximately 1,118,603 existing utility patent applications, granted by the PTO between 1978 and 1998 (and therefore filed prior to June 1995), potentially had their terms extended.[5] The PTO estimates approximately 595,188 of these granted patents will actually have had their terms extended.[6] If this Court finds extensions of existing intellectual property rights to be unconstitutional, the terms of these patents would be unknown.

Currently, patent terms are also extended in order to compensate a patentee for time lost during the term of the patent attributable to an administrative delay beyond the patentee's control, especially delays at the PTO and FDA. 35 U.S.C. §§ 154, 156. As of June 21, 2002, approximately 340 patents were granted term extensions due to FDA delays.[7]

Historically, Congress has extended patent terms via private and public laws in order to promote the useful arts. As early as 1808, Congress extended a patent by private law

5. Figures based upon USPTO unofficial statistics prepared by USPTO Information Products Division, Technology Assessment and Forecast (TAF) Branch at the request of *amicus*.

6. Figures based upon average renewal rates and expiration due to failure of applicants to pay maintenance fees approximated by USPTO Information Products Division, Technology Assessment and Forecast (TAF) Branch at the request of *amicus*.

7. United States Patent and Trademark Office, *Patent Terms Extended Under 35 U.S.C. § 156, available at* http://www.uspto.gov/web/offices/pac/dapp/opla/term/156.html (last modified June 21, 2002).

noting that the extension was for the public benefit.[8] Congress privately granted veterans of World War II patent term extensions in view of the attendant prejudice engendered by their war-time service.[9]

With the flexibility to grant patent extensions, Congress can further the progress of the useful arts by offering additional patent protection in return for valuable research data and added or extended clinical trials. For example, G.D. Searle & Co., the developer of aspartame, an artificial sweetener, applied for a patent extension in 1983 due to delay by the FDA.[10] This delay reportedly stemmed from the FDA's need to extensively review and confirm the validity of test data from outside laboratories.[11] Searle was ultimately awarded an additional term extension of almost six years.[12] The legislation extending G.D. Searle's aspartame patent subsequently resulted in patent extensions for an additional 31 patents.[13] Similarly, Proctor & Gamble sought

8. Act of January 21, 1808, Ch. 13, 6 Stat. 70 (1808).

9. Pub. L. No. 598, 64 Stat. 316 (1950).

10. Richard M. Cooper, *Legislative Patent Extensions*, 48 Food & Drug L.J. 59, 64-65 (1993); *see* Pub. L. No. 97-414, § 11, 96 Stat. 2049, 2065-66 (1983); *see also* Patent Term Restoration Act of 1981, Hearings on H.R. 1937, H.R. 6444, and S. 255 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 427-428.

11. Cooper, *supra* note 10, at 65.

12. *Id.*

13. *Id.* at 85 n.32 (citing Lopid Patent Term Restoration And Fairness Act of 1987, Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on Judiciary, 100th Cong., 1st Sess. 2 (1987)).

and obtained a patent extension on its fat substitute, OLESTRA™.[14] P&G claimed it spent upwards of twenty years dealing with scientific and regulatory issues in seeking to be able to market its product.[15] Merck & Co. obtained an extension for its patent covering the lipid-lowering drug, ZOCOR™, in return for agreeing to conduct non-mandatory pediatric trials on the drug.[16] Patent term extensions also encourage research regarding recombinant DNA technology for human drug products.[17] Without the incentive of patent term extensions, there is a great risk that researchers would reduce their efforts and society would be deprived of life-enhancing benefits.

The knowledge that Congress can extend a patent term in appropriate circumstances (*e.g.*, FDA delay) is an added incentive to invent or invest in development for those who have not yet done so. Petitioners' argument incorrectly focuses on the incentives of the person who already has the copyright or patent and therefore has already invented. This is the wrong focus. As to that person, even a non-extended patent itself provides no incentive to invent, because the act of invention has already occurred regardless of whether or not that person files for or obtains a patent.

14. Cooper, *supra* note 10, at 75, 85 n.67 ("The bills to revive and extend the OLESTRA™ patents were S.1506 and H.R. 2805, 102d Cong., 1st Sess. (1991).").

15. Cooper, *supra* note 10, at 75; *see* Patent Extension Hearing, Hearings on S.526, S.1165, and S.1506 Before the Subcomm. on Patents, Copyrights & Trademarks of the Senate Comm. on the Judiciary, 102d Cong., 1st Sess. 2, 279-89 (Aug. 1, 1991); *see also Senate Approves Patent Extensions*, 5 J. Proprietary Rts. 28 (1993).

16. *Merck gets Zocor patent extension*, Marketletter, March 11, 2002 2002 WL 7178713.

17. 37 C.F.R. § 1.720 (2001).

The relevant incentive is for the public. The public knowledge that Congress has the ability to extend patent terms in appropriate circumstances provides incentives to invent and develop and thereby promotes the progress of the useful arts. To maximize scientific research and development in technologies requiring enormous investment with uncertain returns, Congress needs the power to provide compensating incentives by extending patent terms in appropriate circumstances. *See Evans v. Eaton*, 16 U.S. 454, 518 (1819) (noting that the extension of the patent at issue for a second term after expiration was in pursuance of the promotion of the useful arts). The total inability of Congress to amend patent terms would affect several important patent statutes, including those that set the patent term, and that set forth the conditions under which terms may be extended. 35 U.S.C. § 154; 35 U.S.C. § 156.

III.

EXTENSIONS OF EXISTING COPYRIGHT AND PATENT TERMS DO NOT PER SE VIOLATE THE "LIMITED TIMES" REQUIREMENT OF THE CONSTITUTION

Although the powers of Congress to enact patent legislation are not unlimited, this Court has recognized that "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 941 (1983) (citation omitted).

As early as 1843, this Court recognized that Congress had extremely broad power to legislate on the subject of

patents and that Congress could modify these laws at will. *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843). More recently in *Radio Position Finding Corp. v. Bendix Corp.*, 205 F. Supp. 850, 854 (D. Md. 1962), *aff'd*, 371 U.S. 577 (1963), this Court affirmed the decision of the United States District Court for the District of Maryland which had held that Congress did not exceed its authority by enacting a private statute that allowed a patent holder to effectively extend the term of his patent by filing after the one-year time bar of 35 U.S.C. § 102(b). In doing so, the district court relied on the "direct and indirect expressions of approval of various private laws which have modified the exclusiveness of the grant to the patentee and the long legislative history of the exercise of congressional power to modify the exclusiveness of a patent grant dating, indeed, from shortly after the adoption of the Constitution." 205 F. Supp. at 855. This holding rebuffed a far greater constitutional challenge to Congress' power to extend terms than a mere patent extension for cause. *See also Evans v. Jordan*, 13 U.S. 199 (1819) (patent extended for a second term of 14 years after its expiration); *Agwan Co. v. Jordan*, 74 U.S. 583 (1869) (patent term extended for an additional seven years almost 20 years after it had expired).

Since Congress can determine what constitutes an appropriate "limited Time," Congress can in appropriate circumstances amend this "limited Time" in order to promote progress.

CONCLUSION

For the foregoing reasons, the NYIPLA respectfully requests that this Court reject Petitioners' broad argument than any extension of an existing intellectual property right is unconstitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE DIRECTORS GUILD OF AMERICA, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SCREEN ACTORS GUILD, INC., WRITERS GUILD OF AMERICA, EAST, AND WRITERS GUILD OF AMERICA, WEST, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE [1]

Amici Curiae are associations of creative artists in the audio and visual media.

The Directors Guild of America (DGA) is an association of more than 12,000 directors, assistant directors, and unit production managers. Their creative work includes theatrical, educational and documentary film and television productions, as well as videos and commercials. The DGA seeks to protect and advance directors' legal and artistic rights, to contend for their creative freedom, and to secure them fair compensation.

The American Federation of Musicians of the United States and Canada (AFM) is an international labor organization of over 110,000 professional musicians in the United States and Canada. Musicians represented by AFM record albums, movie sound tracks, television and radio programming, and commercials under industry-wide collective bargaining agreements negotiated by the AFM. Those agreements enhance the economic situation of recording musicians by, for example, providing for compensation tied to the revenues generated by their recorded product.

The American Federation of Television and Radio Artists (AFTRA) is a national labor organization representing more than 80,000 performers and newspersons who are employed in the entertainment, news, advertising, and sound recording industries. AFTRA members perform on television, radio, sound recordings, and CD-ROM's. To ensure that AFTRA members receive proper compensation for their creative efforts, AFTRA works to protect the intellectual property rights of its members and to prevent unlicensed uses of the works on which AFTRA members appear.

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[1] The parties have consented to the filing of this brief. No part of this brief was written by counsel for a party. No one other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief.

The Screen Actors Guild, Inc. ("SAG") is an organization of over 96,000 professional actors and performing artists, including dancers, singers, and stunt performers, in film and television productions. The ability of SAG-represented performers to realize the compensation to which they are entitled by virtue of their performances is inextricably tied to the protection of intellectual property rights and to the prevention of unauthorized copying of the film and television productions in which they perform.

The Writers Guild of America, East (WGA East) is a labor organization of over 6,500 professional authors of stories and screenplays for television, film, and interactive media. The Writers Guild of America, west, Inc. (WGA west), in turn, is a labor organization of over 8,500 professional authors of stories and screenplays for television, film and interactive technologies. Both WGA East and WGA west seek to ensure that writers' intellectual property rights are protected, to advance writers' freedom of expression, and to secure fair compensation to writers for their creative work.

As the creators of audiovisual works, the members of the *amici curiae* organizations have a vital interest in a copyright system that recognizes the central role of artists in the creation of those audiovisual works by encouraging the creation and broad dissemination of creative works and by protecting artists against unauthorized uses of their works. In many instances, these artists' compensation is tied to the successful commercial exploitation over time of the copyrighted works they have created. Congress recognized the vital role that the artists play in creating the works that enhance the nation's cultural life in the text of the Copyright Term Extension Act of 1998: "It is the sense of Congress that copyright owners of audiovisual works for which the term of copyright protection is extended by the amendments made by this Act, and the screenwriters, directors, and performers of those audiovisual works, should negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements

with respect to the amount of remuneration to be divided among the parties for the exploitation of those audiovisual works." Pub. L. No. 105-298 § 105, 112 Stat. 2829 (1998).

SUMMARY OF ARGUMENT

The Copyright Term Extension Act of 1998 ("1998 Act") extends by 20 years—to the author's life plus 70 years in the case of individually authored works, and 95 years in the case of works for hire—the term of copyright for works created after its enactment (the "new works" aspect), and for works that were under copyright as of the date of its enactment (the "existing works" aspect). Both aspects of the Act comport with the Copyright Clause and with the First Amendment.

I. A. The Copyright Clause, in order to "promote the Progress of Science," in the sense of "knowledge" and "learning" generally, grants Congress the power to "secur[e] for limited Times to Authors ... the exclusive Right to their ... Writings...."

In ordinary usage, the copyright term established by the 1998 Act is a "limited Times" term. And, the action of the First Congress in setting the initial term of copyright by reference to the term then in effect in England confirms that it is proper for Congress to set the "limited Times" copyright term within the framework provided by widely accepted standards in the international community. That is what the 1998 Congress did in starting from, and after deliberation determining to adopt, the standard of the 1993 European Union copyright directive.

The 1998 Act is, as well, an enactment that serves to promote the progress of Science. Congress concluded that the 1998 Act would do so in two ways: first, by providing an incentive for the creation of *new* works; second, by providing an incentive for the publication and dissemination over time to a changing public of works *already created*. The Petitioners' primary attack on that conclusion is to argue that copyright's sole legitimate role is promoting the creation of

new works, and they make that argument to elide copyright's role in promoting the dissemination of works already created. But this Court's decisions recognizing that promoting artistic creation is but one goal of copyright, and that an additional goal—indeed the ultimate goal—is to promote the wide *dissemination* of the works thus created, leave no room for that argument.

B. The "new works" aspect of the 1998 Act is consistent with the First Amendment.

The Constitution's text speaks directly to the constitutional system for advancing and protecting free speech in two places: in the Copyright Clause's affirmative grant of legislative power to provide for an intellectual property regime vesting authors with exclusive rights in their writings as a means of promoting free speech and in the First Amendment injunction against laws abridging the freedom of speech. Read together as a unified whole, the Constitution's two express speech provisions lead to the conclusion that copyright law enactments that elaborate basic copyright norms, and that do so in manner that is consistent with basic copyright principles, are an integral component of the Constitution's free speech regime, not enactments that abridge the freedom of speech. The 1998 Act is such an enactment and is constitutional as such.

II. It follows from the foregoing that the "existing works" aspect of the 1998 Act is constitutional as well.

A. It is decisive with respect to the "limited Times" requirement of the Copyright Clause that the extended term applicable to existing works under the 1998 Act is the same term applicable to new works. In both instances, the period is equally limited. And, the "existing works" aspect of the 1998 Act promotes "Science" by promoting the dissemination and periodic re-dissemination of existing works that are in their extended term in exactly the same way as would a law setting an identical term passed prior to the time those works were created.

B. The existing works aspect does not violate the First Amendment. Petitioners base their First Amendment attack on the new works aspect on the premise that the *only* governmental speech-promoting interest that justifies a copyright law is the interest in stimulating the creation of new works. That premise is the same one that underlies Petitioners' argument that the Act does not promote "Science," and it is erroneous for the same reason. Deprived of its premise, the Petitioners' argument fails.

ARGUMENT

The Copyright Term Extension Act of 1998 ("1998 Act" or "CTEA") establishes the term of copyright for works created after its enactment (the "new works" aspect), and for works that were under copyright as of the date of its enactment (the "existing works" aspect). *See* 17 U.S.C. §§ 302-304. As to both categories of works, the CTEA establishes a longer term than that established by the Copyright Revision Act of 1976 ("1976 Act"). Whereas the 1976 Act provided that the basic copyright term for individually authored works is the author's life plus 50 years, the 1998 Act provides life plus 70 years. And, whereas the 1976 Act provided a 75-year term for "works made for hire," the 1998 Act provides a 95-year term. 17 U.S.C. §§ 302-304.

In establishing a copyright term that applies uniformly to all works that have not fallen into the public domain—and in thus declining to make a distinction between works copyrighted pre-enactment and works copyrighted post-enactment—the 1998 Congress followed the unbroken line formed by every Congress to have legislated on the matter, including the First Congress. See *infra* at 26. *No* Congress has ever extended the copyright term for new works without also providing a like extension for works under copyright at the time of enactment.

In this case, the Petitioners, invoking the Copyright Clause and the First Amendment, have filed a complaint challenging

the constitutionality of both the new works aspect of the 1998 Act and the existing works aspect of the CTEA. But in their merits brief to this Court, the Petitioners concentrate their attack on the existing works aspect of the CTEA; indeed, they strive to make it appear that all that the 1998 Congress was about was extending the copyright term of existing works.

By taking one aspect of the 1998 Act out of its statutory context, the Petitioners distort what Congress was in truth about—which was to set a copyright term of general application. By so doing, Petitioners seek to skew constitutional analysis of the CTEA in their favor.

To correct that distortion—and to put the constitutional issues the Petitioners tender back into focus—we begin by addressing the basic question of the constitutionality of the copyright term of general application set by the 1998 Act and by demonstrating that the Act is consistent with both the Copyright Clause and the First Amendment.

We then address whether the 1998 Congress—in following the pattern set by earlier Congresses of establishing a copyright term for existing works that is congruent with the term for new works—acted in conformity with both the Copyright Clause and the First Amendment, and demonstrate that the answer is in the affirmative.[2]

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[2] Throughout their brief, the Petitioners describe the extension of the copyright term in existing works as a "retroactive" act by the 1998 Congress. *E.g.*, Pet. Br. at 2, 14, 17, 18. Their label is incorrect. In Justice Scalia's incisive formulation in his concurring opinion in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the "critical issue" in determining whether a rule is "retroactive" is "what is the relevant activity that the rule regulates." *Id.* at 291. And, the activity the 1998 Act regulates with respect to works under copyright on the date of enactment is the dissemination of those works after the Act's effective date—an activity the CTEA seeks to encourage by extending the economic incentive to disseminate works provided by copyright. *See infra* at 10-18. There is therefore nothing "retroactive" about extending the duration of copyright protection in existing works, and for that reason we refer to that aspect of the CTEA as the "existing works" aspect. (By way of contrast, the "retroactive" label in copyright would apply to a law that imposed liability for a previously permitted use, such as a law restoring the copyright in a public domain work that had been exploited pre-enactment by users other than the copyright owner. *Cf.* 17 U.S.C. § 104A.

I. THE ASPECT OF THE 1998 ACT ESTABLISHING THE COPYRIGHT TERM APPLICABLE TO NEW WORKS IS CONSTITUTIONAL

A. *The Copyright Clause.* The Copyright Clause, in order to "promote the Progress of Science," grants Congress the power to "secur[e] for limited Times to Authors . . . the exclusive Right to their . . . . Writings . . . ." U.S. Const. art. I § 8, cl. 8. The 1998 Act is a proper exercise of that power.

1. In ordinary usage, the copyright term established by the 1998 Act—life plus 70 years in the case of individually authored works, and 95 years in the case of works for hire—is a "limited Time[s]" term. To "limit," according to dictionaries in use at the time of the Constitution's framing, means "to set Limits or Bounds to," N. Bailey, *A Universal Etymological English Dictionary* (24th ed. 1776), or "to confine within certain bounds," Samuel Johnson, *Dictionary of the English Language* (3rd ed. 1768). And, the CTEA does "set [temporal] limits or bounds" to the term of copyright.

While the Constitution states that the term of copyright shall be for "limited Times" it does not set the number of years or the maximum number of years in a proper "limited Times" term. Thomas Jefferson did propose in an August 28, 1789 letter to James Madison that the Bill of Rights include an amendment that would prescribe the number of years constituting the maximum duration of copyrights and patents. *See* 15 The Papers of Thomas Jefferson 367-68 (Princeton, 1958). But no such proposal was adopted.

Nor do the contemporaneous debates or other constitutional materials establish a calculus for setting a point in time

at which a copyright in a work is to terminate and the work is to enter the public domain.

The upshot, as the Court stated in respect to the Patent Clause, is that these "exclusive right[s] shall exist but for a limited period, and that period shall be subject to the discretion of Congress." *Pennock v. Dialogue*, 27 U.S. 1, 16-17 (1829).

In exercising that discretion, every Congress has started its deliberations from the evolving judgments in the international community as to a proper copyright term and used those judgments as its lodestar.

The First Congress followed the English Statute of Anne. *Compare* Copyright Act of May 31, 1790, 1 Stat. 124 (establishing 28-year maximum duration of copyright) *with* Statute of Anne, 8 Anne, ch. 19 (1710) (same).

By 1831, England had extended the term specified in the Statute of Anne, 54 Geo. 3, ch. 156 (1814), and taking that and other international developments into account, Congress lengthened the term of copyright to 42 years noting that doing so placed authors in the United States "more nearly upon an equality with authors in other countries." House Comm. on the Judiciary, 21st Cong., Report to Accompany a Bill on Copy-right (Dec. 17, 1830), *reprinted in Gales & Seaton's Register*, App., cxix. *See also* Act of Feb. 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436.

The 1909 Congress, while declining to adopt the 1908 Berne Convention's copyright term of life of the author plus 50 years as the United States term, was spurred by the adoption of that international standard to reconsider the United States term of copyright and after lengthy deliberation to increase it to 56 years. *See* H.R. Rep. No. 60-2222 (1909).

Then, after the most detailed and prolonged consideration, the 1976 Congress did determine that the proper course was to adopt the Berne Convention standard on the basic copyright term as the United States standard. *See* H.R. Rep.

No. 94-1476, at 135-136 (1976). And, inasmuch as the Register of Copyrights had informed Congress that the average work was authored 25 years before the author's death, the 1976 Congress adopted a term of 75 years (25 plus 50) applicable to works for hire and to pre-enactment individually authored works. *Id.* at 135.

Finally, the 1998 Congress, in establishing the terms at issue in this case, took as a guide the 1993 European Union Copyright Directive, which called for a basic copyright term of the author's life plus 70 years. *See* Council Directive 93/98, 1993 O.J. (L. 290/9).

As the action of the First Congress confirms, the Copyright Clause contemplates that it is a proper exercise of that power for Congress to set, and of course to reset, the "limited Times" copyright term by reference to widely accepted standards in the international community. And, so long as Congress acts within that framework—as every Congress has—there is nothing to the Petitioner's argument that Congress treats its Copyright Clause power to set the copyright term as a power without an "outer limit" that stands on a different footing from the Commerce Clause power, which as this Court held in *United States v. Lopez*, 514 U.S. 549 (1995), must be interpreted as having some "judicially enforceable outer limits." See Pet. Br. at 11-12.

2. The 1998 Act is, as well, an enactment that serves to "promote the Progress of Science."

(a) It is common ground that the word "Science" at the time of the Constitution's framing connoted "knowledge" and "learning" generally. N. Bailey, *A Universal Etymological English Dictionary* (24th ed. 1776); Pet. Br. at 14-15 & n.4 (setting forth identical definitions of "Science"). The copyright regime promotes knowledge and learning in at least two ways: first, by providing an incentive for the creation of *new* works of authorship; second, by providing an incentive

for the dissemination over time to a changing public of the works the author *has created*.

The Petitioners seek to elide copyright's role in promoting the dissemination of works already created. They assert that the "only" copyright interest "that this Court has recognized" is "providing incentives to authors to create original works," Pet. Br. at 40, as a prelude to belittling the contribution of the 1998 term extension to the creation of new works and to arguing that that term extension for existing works does not serve any legitimate copyright purpose. *See also* Pet. Br. at 15 ("'[T]he Progress of Science' means 'artistic creativity,' *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), 'the creative activity of authors,' *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 546 (1985) . . . , 'the creative effort,' *id.* at 450, 'the creation of useful works,' *id.* at 558 . . . .").

The Petitioners' postulate that the sole office of copyright is to stimulate the creative impulse—on which their entire elaborate legal presentation rests—could not be more wrong. Given the importance of that postulate to the Petitioners' case, we devote ourselves here to demonstrating just how wrong it is.

At the threshold, the very cases cited by Petitioners establish that promoting artistic creation is but one goal of copyright, and that an additional goal—indeed the ultimate goal—is to promote the widespread *dissemination* of the works thus created. As this Court said in *Twentieth Century Music*, "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting *broad public availability* of literature, music, and the other arts." 422 U.S. at 156 (emphasis added). And, in *Harper & Row*, the Court said that "copyright supplies the economic incentive to create *and disseminate* [works]." 471 U.S. at 558 (emphasis added). See also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (the "goals of the copyright law" are "to stimulate the creation *and*

publication of edifying matter") (emphasis added) (internal quotation marks omitted).[3]

As the Court has thus recognized, the copyright law is at several removes from a law that directly fosters creativity by providing for an immediate and certain grant payment to an author for creating a new work. In contrast, the copyright law *indirectly* fosters creation by an author by *directly* fostering dissemination of the author's works through an economic incentive to exploit those works. That incentive takes the form of the exclusive right to reproduce the work and to distribute copies of the work to the public by sale, rental, or lease, and to perform the work publicly. See 17 U.S.C. § 106 (listing the exclusive rights protected by copyright).

The effect of conferring those exclusive rights on the author is to guarantee that a copyright holder who invests the

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[3] The Petitioners stray even further when they suggest that the only "aim" of copyright—and the only way that copyright legislation can promote the "Progress of Science"—is by "induc[ing] the production of something 'new to the world,'" Pet. Br. at 15-16 (quoting *Pennock v. Dialogue*, 27 U.S. at 20), or by "'bring[ing] forth new knowledge,'" Pet. Br. at 16 (quoting *Graham v. John Deere Corp.*, 383 U.S. 1, 8-9 (1966)). Both quotations are from *patent* cases and reflect the principle that an invention to be patentable must be novel. It long has been established that a work need not be novel to be entitled to copyright protection, and that the only copyright requirement is that the work be "original" in the sense of owing its origin to the author as opposed to being copied. *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (Hand, L., J.).

The Petitioners make a similar error when they attempt to derive from this Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), the proposition that copyright is concerned only with inducing the creation of new works. *Feist* simply held that a person who compiles facts cannot claim to be the "Author" of those facts within the meaning of that term as used in the Copyright Act or in the Constitution's Copyright Clause, because facts do not originate in the mind of the author. *Feist* indeed reaffirms that "[o]riginality does not signify novelty." 499 U.S. at 345-46.

time, work, and money involved in the often risky venture of exploiting a work by marketing it and distributing it, is entitled to the full economic rewards of the work's success. Indeed, it is axiomatic that, without that guarantee's protection against unauthorized third person exploitation of the work, a myriad of worthy works would never reach the public. That would be so where, as is often the case, no one would have an adequate incentive to incur the risks involved in the dissemination undertaking if he knew that any favorable early reception of the work would predictably be followed by the prompt appearance of free riders able to appropriate a share of the potential proceeds. See *Harper & Row*, 471 U.S. at 559 ("If every volume that was in the public interest could be pirated away by a competing publisher . . . the public soon would have nothing worth reading.") (Internal quotation marks omitted).

The same exclusive rights "intellectual property" system that spurs the copyright holder to expend the effort involved in the creation and initial dissemination of a work, spurs the copyright holder to expend the effort involved in the periodic dissemination of the work over time so as to bring the work to changing publics. As Judge Weinfeld cogently explained in *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 543 F. Supp. 844, 862-63 (E.D.N.Y. 1982), *aff'd sub nom. Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985):

> Artistic production does not end with completion of a creative work by the artist. The public interest depends on the broad public availability of the works. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Copyright protection, in addition to encouraging authors, also induces publishers . . . to invest their resources in bringing creative works to the public by the prospect of a profitable return.
>
> As with other [copyright holders], permitting music publishers to share in the extended term offers opportunity for additional returns, thereby encouraging them to invest further in copyrighted musical works and thus contribute further to the dissemination of such works.

In many circumstances—and particularly in the circumstances of most concern to the *amici curiae* as creators of audiovisual works—the advance of technology generates a clear public interest in encouraging additional efforts to disseminate works that, though disseminated in one medium, have not yet been disseminated in later-developed media. For example, the developments whereby video cassettes have supplemented the screening of motion pictures as a means of disseminating films, and DVD's are in the process of supplanting videocassettes, has generated a corresponding need to provide for the re-dissemination of films in these new formats.[4]

In many other circumstances, the repeated dissemination of works over periods of time in a *single* medium plays a large role in assuring a full, varied and lively culture. Musical and literary works are often discovered or rediscovered years after their initial publication in response to changes in public tastes and interest. As one composer who testified before Congress put it:

> There are innumerable composers whose works *never* reach their pinnacle of public recognition until after their death. Herman Hupfeld ("As Time Goes By"), Vincent Youmans, and Charles Ives are just three examples. Whether it is because their music is *avant-garde*—or out of synch with what is currently popular—such artists toil

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[4] Indeed, where new media render old media obsolete—as in the case of compact discs, which so thoroughly displaced vinyl records as the principal medium through which musical works are disseminated that the phonograph players and turntables needed to play vinyl albums have become virtually nonexistent (a fate that is one day expected to befall the videocassette player)—there is an especially heightened public interest in re-dissemination of works, since the old media copies have become all but useless.

in obscurity for most of their creative days. [*Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 105th Cong.* ("1997 House Hearing") 85.]

At the same time, the author of a work will face costs and risks in reintroducing and marketing his work to the public in a new medium—or in the same medium as the original—that are similar in kind to the costs and risks faced in the initial introduction of a work to the public. The public's interest is too fickle and uncertain to make prediction accurate and the putative first entrant must take account of the increasing ease and rapidity with which opportunistic copiers can enter on his heels and siphon off the revenues his marketing and other preparatory efforts made possible. *See* S. Rep. No. 104-315, at 8, 14 (1997). The re-release of old films, which are in poor physical condition and must be restored at great expense, is a particularly telling example of just how high the costs and risks of re-dissemination can be. *See* S. Rep. No. 104-315 at 13.

In sum, a main social benefit of a longer copyright term is that it provides a continuing economic incentive to make periodic disseminations of works over time that justifies incurring the costs and taking the risks associated with that undertaking. *See* Saul Cohen, *Duration*, 24 U.C.L.A. L. Rev. 1180, 1181 (1977) ("[T]here are works worth being kept in print that would not be published if the publisher could not be assured that his edition would be the only one available to capture such market as might exist. Why invest in printing and advertising if another publisher with a low overhead can

reproduce an earlier edition by photocopying and sell it for substantially less?").[5]

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[5] To put the point developed in text regarding the copyright system's role in promoting the wide dissemination of works into some perspective, we briefly note a few additional salient points:

First, in addition to the copyright system purposes noted in text, copyright gives force to the author's superior claim to the financial rewards reaped from exploiting his works and recognition to the importance of providing fair compensation to authors for their creative endeavors. Lengthening the term of copyright is a means of serving these purposes and by so doing of providing the social benefit of encouraging authors to create and disseminate their works.

Second, no matter how many works are under copyright, the copyright system continues to exert its salutary effect of encouraging the creation and dissemination of new works. Where a copyright systems obtains, each person has the right to create and disseminate his *own* copyrightable work. In so doing, that person has the right to draw on the ideas in works under copyright, *see* 17 U.S.C. § 102, *viz.*, to follow themes, plot devices, and other structural elements of copyrighted works; and to make "fair use" of works under copyright, 17 U.S.C. § 107—subject only to the limitation that he may not reproduce and disseminate the particular expression of an idea in an author's copyrighted work in whole or in substantial part. That narrow limitation can not possibly be said to negate, or even to compromise, the copyright system's encouragement of the continuing process of creating and disseminating new works.

Third, the copyright system benefits are not realized at the cost of promoting copyright holder monopoly pricing and its inefficiencies. Unlike patented pharmaceuticals, for example, copyrighted works are highly substitutable and must compete in the market with other similar works, which pushes the price of copyrighted works toward the competitive market level. *See Copyright Term, Film Labeling, and Film Preservation Legislation: Hearing on H.R. 989, H.R. 1248, and H.R. 1734 Before the House Subcomm. of Courts and Intellectual Property of the Comm. on the Judiciary*, 104th Cong. ("1995 House Hearing") 584. As was pointed out in the hearings on the 1998 Act, "[a] motion picture company that seeks to charge $129.95 for a videocassette of a popular action-adventure film will quickly discover that most of its prospective buyers will choose a competitor's lower-price action-adventure film instead." *Id. See also The Saturday Evening Post Co. v. Rumbleseat*

(b) In the series of hearings it conducted in the years preceding passage of the 1998 Act, Congress heard—and determined to credit—abundant testimony to the positive effect of an extension of the copyright term on the dissemination of works already created A few examples capture the essence. Bruce A. Lehman, the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, testified that:

> The consumer cannot enjoy a public domain product that is stuffed away in the Library of Congress somewhere unless he gets on a plane and goes to do it . . . [I]f you really want to get works out to the public all over the country and all over the world, you have got to give business the incentive of the copyright so they have

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Press, Inc., 816 F.2d 1191, (7th Cir. 1987) (Posner, J.) (Copyright "does not forbid the making of close substitutes").

Fourth, the copyright system, like any private property system for inducing productive activity, is imperfect in that it does not assure that each and every copyright holder (intellectual property owner) will be skillful and diligent in exploiting his property right. But our entire economic system rests on the proposition that no system for inducing productive activity is perfect and that the private property system is the least imperfect in that the great majority of property owners will seek—whether through their own efforts or through licensing or transfer arrangements—to maximize the value of their assets.

Fifth, given the multitude of motivations for creating and disseminating works, the multiple means of providing outside subsidies to these activities and the fact that certain works realize their full economic potential almost immediately on release, there can be no doubt that some baseline number of works would be created and disseminated in the absence of a copyright system. But there also can be no doubt that copyright serves to generate the creation and dissemination of works at a level well above that baseline. Nor can there be a doubt that copyright has its most marked effect in the creation and dissemination of works that have a lasting value rather than a mere initial transitory appeal—like the motion picture "Wizard of Oz," which was not commercially successful in its initial release, and through re-release became a classic.

> something to work with, the property right that they can protect, and then they will republish new editions of works. They will put them in videocassette form and audiocassette form and CD-ROM and multimedia and so on. [*The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 35 ("Senate Hearings")]

See also id. at 34 ("[W]e are not just talking about the incentive to create. We are talking about the incentive to take already existing works and reuse them in new formats."); *id.* at 34, 115 (testimony of Register of Copyrights Marybeth Peters to same effect).

In his testimony before the House Subcommittee on the Courts and Intellectual Property, Mr. Lehman added that:

> This wasn't just something we considered in my office; every single department of the administration with any involvement in this—the Justice Department, the U.S. Trade Representative, the Education Department, and others—support this view. On balance, we felt that the commercial incentive of the additional period of time warranted supporting the legislation above and beyond the international implications [warranting the legislation]." [1995 House Hearing at 222.]

And, in response to a question from Senator Brown, Patrick Alger, President of the National Songwriters' Association, put the point in graphic practical terms:

> When a work goes into the public domain, the two parties (namely the music publisher and the author) that had the most interest in exploiting the work no longer participate in the revenue flow. What generally happens is that works become harder to find and works that were marginally popular disappear altogether. [*Id.* at 123.]

On the basis of extended consideration of all the testimony on the effects of an increase in the term of copyright—both pro and con—Congress came to the eminently reasonable

conclusion that the passage of the 1998 Act would promote "Science" in precisely the ways that copyright is intended to promote "Science": by promoting the creation of new works *and* by promoting the broad dissemination of works already created to changing publics over periods of time. That amply justified conclusion provides a more than sufficient base for the 1998 Congress' exercise of its Copyright Clause power to set the term of copyright.[6]

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[6] Petitioners' call for judicial review of Congress' choice of the copyright term on a heightened scrutiny basis that demands more than that the choice be reasonably related to promoting Science is doubly improper.

First, as noted by the Court of Appeals, it ignores that the Copyright Clause is supplemented by the "Necessary and Proper" Clause, the latter of which clauses authorizes legislation that is "appropriate" and "plainly adapted" to a substantive grant of legitimate power. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

Second, any such heightened review would read the Copyright Clause as one that assigns to the courts the role of prescribing the length of the maximum permissible copyright term. And the Clause cannot sensibly be read to make such an assignment.

"The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law." *See* House Report No. 94-1476 (1976), at 33. It is a debate in which the proponents on both sides are forced to make their case on unproved and unprovable postulates rather than on argument from scientific empirical studies. No such studies have been performed to date, and, given the complexity and multiplicity of variables at play, it is doubtful that any empirical study *could* be constructed that would be sufficiently sophisticated.

Complicating the matter further is that any such study—even if one could be developed—would invariably present decisionmakers with tradeoffs that could be resolved only by reference to subjective value judgments rather than objective facts. The study might reveal, for example, that a certain category of works (*e.g.* works of potential, but unpredictable, popular appeal) will be disseminated or re-disseminated over time only if the term is *x* years or longer, whereas the dissemination or re-dissemination of a different category of works (*e.g.*, works with no commercial appeal but perhaps with some noncommercial appeal) will be delayed under a regime with a term of *x* years or longer.

There is of course no principled basis on which it can be argued that the kinds of works that would be disseminated only under the protection of a longer copyright term would be less valuable to the public in "knowledge" and "learning" terms than the kinds of works whose dissemination would be delayed by such a term.

B. *The First Amendment.* The Petitioners fault the court below for categorically rejecting their First Amendment challenge to the new work aspect of the 1998 Act while doing little to give any legal substance to that challenge beyond proposing two irreconcilable tests for judging the validity of their claim.

First, the Petitioners suggest, and then all but abandon, the proposal that an act setting the duration of the term of copyright:

> should be reviewed under the very same standard that *Harper & Row* announced and applied: that copyright law may be upheld against First Amendment challenge insofar—but only insofar—as it protects an "engine of free expression," *Harper & Row*, 471 U.S. at 558. and that it should be invalidated if its restrictions "merely inhibit access to ideas without any countervailing benefit," *Sony [Corp. of America v. Universal City Studios, Inc.]*, 464 U.S. 417, 450-51 [1984]. [Pet. Br. at 36-37.]

Second, and without attempting any reconciliation with the first test, the Petitioners say that an act setting the term of copyright should be reviewed under the heightened First Amendment standard of *Turner Broadcasting* which provides that an enactment will withstand constitutional scrutiny only

> [1] if it advances important governmental interests unrelated to the suppression of free speech and [2] does not burden substantially more speech than necessary to

> further those interests. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997). [Pet. Br. at 39; *see also id.* at 40 n.14.]

The Petitioner's first test is not a general First Amendment test at all. Rather it is quite appropriately a Copyright Clause/First Amendment-specific test that is derived from this Court's copyright cases, and that is rooted in the understanding that the Copyright Clause and the First Amendment are so closely related in the constitutional text as to require that they be read as two parts of an integrated whole. And, while we would not say that the Petitioner's somewhat inelegant locution—one part *Harper & Row* and one part *Sony*—is a definitive statement of the proper test, it does suffice as a fair marker.

In contrast, the Petitioners' proposed second test—which is indisputably a proper test for judging enactments touching on speech interests that are *not* Copyright Clause enactments—is not derived from the Court's copyright cases, does not take into account the structural relationship of the Copyright Clause and the First Amendment in the Constitution, has never been applied to judge the constitutionality of a Copyright Clause enactment, and does not provide a proper basis for making such judgments.

The Constitution's text speaks directly to the constitutional system for advancing and protecting free speech in two places. The Copyright Clause expressly grants to Congress the power to enact legislation to "secur[e] for limited Times to Authors . . . the exclusive Right to their . . . Writings. . . ." And, the First Amendment states the injunction that "Congress shall make no law . . . abridging the freedom of speech." We would suggest that this text teachs three lessons that are to the point here.

First, as this Court has stated, "The Framers intended copyright itself to be the engine of free expression." *Harper & Row*, 471 U.S. at 558. And, the Framers most certainly

understood that a grant to authors of the exclusive right to their writings as a means of promoting expression entails a negation of the right of third persons to reproduce and disseminate the authors' writings. Those two points being so, the conjunction of the Copyright Clause and the First Amendment as the Constitution's two express speech provisions demands the following conclusion: federal legislation for effectuating an exclusive rights intellectual property system of the kind the Framers knew and favored is not "legislation . . . abridging the freedom of speech" violative of the First Amendment but legislation that furthers the overall constitutional plan for advancing and protecting free speech. That is the only conclusion that makes sense of what the Constitution says and that does not put the Constitution's two speech provisions—one a positive grant of legislative power, the other a negative check on legislative power—into constant conflict.

Beyond that, the Copyright Clause grant of legislative power, which speaks in general and not specific terms, is a grant that plainly empowers Congress to go beyond enacting an initial copyright law, such as that embodied in the 1790 Act, by adapting that law's norms to the changes in the social, economic and technological factors that affect the creation and dissemination of works and our understanding of what legislative actions are effective in promoting the creation and dissemination of works. It follows from what we have said about the Copyright Clause/First Amendment intersection that copyright law amendments that elaborate basic copyright norms in a manner that is consistent with basic copyright principles (and most particularly with the "fair use" principle and the idea/expression dichotomy, *see* note 5 *supra*) are laws that are consistent with the First Amendment and not laws "abridging the freedom of speech." Like the 1790 Act, such enactments are validated by the Constitution's two speech provisions read together as a whole.

Third, and finally, the heightened-scrutiny First Amendment test of *Turner Broadcasting* that applies to various and sundry enactments that touch on speech interests in any of a myriad of ways is inapposite in judging the constitutionality of Copyright Clause laws like the 1998 Act.

There is nothing in the Constitution's text or in the constitutional materials that throws so much as a cross-light on whether or not a statute like the *Turner Broadcasting* "must carry" law (enacted pursuant to the Commerce Clause), that affects speech interests in a novel or idiosyncratic way, is a "law abridging the freedom of speech." Given the nature of the First Amendment protection of freedom of speech and the absence of any further guide in the Constitution's text, the Court has put the burden on the Government in such cases to make a *Turner Broadcasting* showing as a means of carrying its burden to demonstrate that its legislative action is not an improper intrusion into the free speech regime.[7]

In contrast, for the reasons we have given, where the challenge is to a law elaborating a basic copyright norm in a manner consistent with copyright principles, the text of the Constitution's two speech provisions, without the need for a supplemental government showing, provides the legal basis for the conclusion that the law is not a law that improperly intrudes into the free speech regime. The Constitiution provides for an exclusive rights intellectual property system—that by its nature affects both author and third person speech interests—as an *integral component* of the free

[7] *See, e.g., Hill v. Colorado*, 530 U.S. 724 (2000) (law prohibiting approaching within eight feet of another without his consent in a 100-foot zone around a health care facility); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (law regulating sound amplification in public park); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (law regulating sleeping in public parks applied to camping in tents as a form of expression); *United States v. O'Brien*, 391 U.S. 367 (1968) (law prohibiting mutilation of draft cards).

speech regime, and not as a *suspect intrusion* that threatens to upset that regime.

To paraphrase and answer the Petitioners' second Question Presented in light of the foregoing: A law like the 1998 Act that elaborates a basic copyright norm in a manner consistent with copyright's basic principles is categorically (as such a copyright law) valid under the First Amendment.

2. Since we began with the Petitioners' first test for judging the constitutionality of the new works aspect of the 1998 Act, it is helpful to restate our argument that this enactment is constitutional in terms of the Petitioners' *Harper & Row/Sony* test.

(a) As *Harper & Row* explains, "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." 471 U.S. at 558. On that basis, the Court rejected the argument that third persons have a First Amendment right to commercially exploit works of "public interest," reasoning that "the public soon would have nothing worth reading" if copyright could not guarantee the author the exclusive right to exploit such works. *Id.* at 559.

By extending the copyright term as it stood at the time of *Harper & Row* (then it was the author's life plus 50 years), the 1998 Act "supplies [an enhanced] incentive to create and disseminate ideas"—and most particularly to disseminate ideas by distributing and redistributing works over periods of time—thereby making copyright a stronger "engine of free expression."

The CTEA's elaboration of the basic copyright norm setting the term of copyright is moreover entirely consistent with basic copyright principles. In exercising its power to reset the terms of copyright, Congress acted in the manner of all previous Congress, considered the factors all previous Congress had considered, and acted within the limiting guidelines all previous Congress had recognized. *See supra*

at 8-9. And, in this instance, Congress took *no* action to augment in any way the copyright owner's exclusive rights as they stood at the time or to work any diminution in the kinds of uses third persons who are creating and distributing works can make of copyrighted works under the copyright law's "fair use" provision or otherwise. Congress, in other words, acted in a manner that strengthened copyright as a "engine of free expression" and did so without making any alterations to the engine's structure.

(b) Turning to the *Sony* portion of the Petitioner's test, the 1998 Act can not be characterized as a law that "merely inhibit[s] access to ideas without any countervailing benefit." The 1998 Act, in its new works aspect, provides at least two countervailing benefits. First, by providing authors a longer period to seek a profit by marketing their works, the 1998 Act—like its predecessors the 1976 Act, the 1909 Act, and the 1831 Act—strengthens the incentive to create new works. Second, as we have explained, the Act strengthens the incentive to make periodic efforts to disseminate works over time. *See supra* at 16-18.

To be sure, one group of Petitioners' *amici curiae* argue that the 1998 Act does not provide a sufficient incentive to the creation of new works to pass First Amendment muster. See Brief of Jack M. Balkin *et al.* at 23. That argument rests on the proposition that, as a matter of microeconomic theory, the marginal inducement to create a new work that is provided by the possibility of a reward that would inure to the author's benefit more than a handful of years from the date of creation is "very small," and thus too negligible to justify restrictions on unauthorized third person exploitation of the author's work thereafter. See Brief of George A. Akerlof *et al.* at 5-7.

Why this theory provides the First Amendment basis for evaluating a term extension law's benefits we are not told. And, why this theory is sufficient to invalidate a life plus 70 year term on First Amendment grounds, but not the 1976

Act's life plus 50 year term, the 1909 Act's 56-year term, the 1831 Act's 42-year term, and even the 28-year term adopted by the First Congress, is never explained even though each of those enactments provided for the author's exclusive right to market his work long after its initial creation.

We would add that this argument from microeconomic theory rests on a misstatement of the copyright law's goals and its means for reaching its goals and thus provides no basis to nullify *any* of the copyright terms that Congress has set from 1790 to 1998. The argument is predicated on the erroneous premise that the sole point of copyright is to stimulate the *creation of new works* in the same manner as a law providing only for an immediate grant payment to an author who creates a new work. *See, e.g.*, Pet. Br. at 40. In truth the means by which a copyright regime furthers speech is "[b]y establishing a marketable right to the use of one's expression," thereby "supply[ing] the economic incentive to create *and disseminate*" works, *Harper & Row*, 471 U.S. at 558 (emphasis added), and to generate "broad public availability of literature, music, and the other arts." *Twentieth Century Music*, 422 U.S. at 156. A skewed assessment of the benefits of a copyright term extension law that takes no account of its benefit in fostering distributions of works over time provides no support for declaring the law unconstitutional.

II. THE ASPECT OF THE 1998 ACT ESTABLISHING THE COPYRIGHT TERM APPLICABLE TO EXISTING WORKS IS CONSTITUTIONAL

It follows ineluctably from the foregoing showing that the existing works aspect of the 1998 Act is constitutional as well.

A. *The Copyright Clause.* It is decisive with respect to the "limited Times" requirement of the Copyright Clause that the extended term applicable to existing works under the 1998 Act is the *same term* as the term that applies to new works.

We have shown that insofar as it governs new works this term is a proper Copyright Clause "limited Times" term. And, there is no logic to the proposition that Congress transgresses the "limited Times" requirement of the Copyright Clause by providing that the term for existing works shall be the same total number of years as for new works. In both instances, the period is equally limited.

Petitioners' suggestion that even if the 1998 Act on its face sets a proper "limited Times" term, it should not be judged for what it is—but as merely a temporary stopping point on a congressional march toward providing "perpetual" terms for existing works—has no basis in what Congress has in fact done. Congress has only extended the basic copyright term four times—in 1831, 1909, 1976, and 1998—and in each instance Congress has set a proper "limited Times" term for new works and has provided for parity between new works and existing works under copyright.[8]

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[8] Beginning in 1962 and continuing through the mid 1970's, Congress—anticipating that it would extend the term of copyright for new and existing works as part of a comprehensive copyright law revision then underway—enacted a series of temporary one and two-year interim extensions of copyright for existing works still under copyright. *See* H.R. Rep. No. 94-1476, at 134 n.1 (citing and stating purpose of interim extension laws). In 1976, Congress enacted the anticipated revision and in so doing established an identical term of 75 years from the date of publication for all works published prior to the effective date of the 1976 Act and still under copyright. The 75-year term was chosen for pre-enactment works, principally because the 75-year term was viewed as the closest equivalent of the life-plus-50 term. See p. 9 *supra*.

The effect of the 1976 enactment was to provide a duration regime no different than the one that would have obtained had Congress by a single Act adopted a life-plus-50 term for new works and the 75-year term for pre-existing works. It is therefore misleading for the Petitioners to suggest that Congress revisited the question of the basic term multiple times during the 1962-1976 time period. In fact, Congress made just one judgment during that time period—that the term for new works would be extended and that existing works would be treated equally—but the vicissitudes of the legislative process made it necessary to take several interim steps in order to effectuate that judgment.

Moreover, recent Congresses—toward which the Petitioners direct particular criticism—have *not* demonstrated any intent to frustrate the entry of works into the public domain. Every year between 1978 and 1998, works published 75 years earlier entered the public domain. And from 1976 until 1993—when the European Union life-plus-70 directive triggered Congress' historical concern with the alignment of the United States Copyright term and international standards—Congress did not so much as consider extending the term of copyright.

The specter Petitioners raise of a congressional scheme to establish a perpetual term sub rosa is fanciful.

2. The "existing works" aspect of the 1998 Act promotes "Science" in two respects.

First, the 1998 Act's term extension promotes the dissemination and periodic re-dissemination of existing works that are in the extended part of their term in exactly the same way as would a law setting an identical term passed prior to the time those works were created. In so doing, the Act promotes "Science"—*viz.*, knowledge and learning—in precisely the way that copyright law is intended to promote knowledge and learning. See *supra* at 10-18.

The Petitioners never do business with this dispositive point. Instead, they insist that the broad dissemination and periodic re-dissemination of works to the public has nothing to do with advancing knowledge and learning, and that only "new creation" can do so.

We have demonstrated in detail the error of the Petitioners' position in this regard. *Supra* at 10-15. At the risk of undue repetition, this Court's decisions in *Twentieth Century Music Corp.* and *Harper & Row* establish that copyright's ultimate goal is to promote the widespread dissemination of authors'

works. And, the Court could hardly have concluded differently. Knowledge and learning are not well served by solipsism; an author who creates works of intellectual value solely for herself does far less to further knowledge and learning than an author who creates the same works and undertakes the task of disseminating those works to the public.

Second—and contrary to Petitioners' assertion that extending the copyright in existing works cannot possibly have the effect of inducing the creation of new works—Congress' uninterrupted pattern of providing extensions of copyright for existing works in conjunction with extending the term for new works does exert such an effect. It does so by advising authors that if they create a work, they can reasonably expect to be accorded equal treatment if and when Congress makes a determination that the copyright term should be extended for new works.

Petitioners proceed from the premise that authors in deciding whether to create a new work are in a state of perfect half-ignorance: on the one hand, Petitioners would have it, authors are keenly aware of the term of the copyright appearing in the statute books; but, on the other, they are wholly unaware of the unbroken line followed by multiple Congresses of providing to existing works the benefit of the extended term considered appropriate for new works.

That premise is too contradictory to withstand scrutiny. Those who are legally and economically sophisticated enough to know the particulars of copyright will also be sufficiently sophisticated to know of and to take note of the history of extensions to the term of copyright and of the equal treatment that Congress invariably has accorded works under copyright as of the time of a copyright term extension. That sense of assurance that copyright law will accommodate changed circumstances and treat authors fairly is surely a substantial inducement to create new works.

B. *The First Amendment.* In contrast to the Petitioners' First Amendment attack on the new works aspect of the 1998 Act—which is bottomed on the assertion a twenty-year addition to the term of copyright that a life-plus-70 term does not *sufficiently* advance the governmental interest in stimulating the creation of new works to justify—their attack on the existing works aspect of the Act is that an increase in the term for these copyrighted works does not advance the interest in creating new works *at all*. Pet. Br. at 40. That is fatal, say Petitioners, because the only governmental speech-promoting interest that justifies a copyright law is the interest in stimulating the creation of new works. Pet. Br. at 40 ("the only content-neutral interest that this Court has recognized as sustaining copyright's speech restrictions—namely, providing incentives to authors to create original works, *Harper*, 471 U.S. at 558—is irrelevant once a work has been created").

This is the same premise that underlies Petitioners' argument that the existing works aspect of the 1998 Act fails to "promote Science," and it is erroneous for the same reason. Copyright, as we have emphasized, is *not* concerned solely with, and is *not* justified solely by, stimulating new creative works. As this Court has said in *Twentieth Century Music*, "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting *broad public availability* of literature, music, and the other arts." 422 U.S. at 156 (emphasis added). *See also* discussion *supra* at 10-15. For precisely that reason, copyright also is very much concerned with—indeed is centrally concerned with—stimulating the wide dissemination of works already created. And, that dissemination interest is a speech-enhancing interest just as surely as is the interest in stimulating the creation of new works.

The recognition that the existing works aspect of the 1998 Act serves the governmental interest in stimulating the wide dissemination of works already created dooms Petitioners' First Amendment claim. As noted, Petitioners have proposed

two irreconcilable tests, one derived from *Harper & Row* and *Sony* and one derived from *Turner Broadcasting*. And, as we have shown, only the former test is basically consistent with the Constitutional plan and this Court's copyright jurisprudence. Under that test, a copyright provision that "protects an engine of free expression" and that does not "merely inhibit access to ideas without any countervailing benefit," is to be upheld. Pet. Br. at 36-37 (internal quotation marks omitted). The 1998 Act in its existing works aspect, as in its new works aspect, "protects an engine of free expression" by providing an enhanced incentive for the broad dissemination of works over time. And by so doing, the Act provides a real and substantial benefit and is not a "mere[] inhibit[ion] [on] access to ideas."

We would add that even accepting *arguendo* Petitioners' premise that inducing the creation of new works is the sole legitimate First Amendment justification for copyright, the 1998 Act still passes muster. As we have shown, the 1998 Act by continuing the unbroken line begun by the First Congress of providing that the term applicable to new works will be equally applicable to works already in existence, reinforces Congress' assurance to authors that any new works they create will enjoy the benefit of whatever term extensions are considered by Congress to be appropriate in the future. *See supra* at 28. In so doing, the Act makes good on this inducement to authors to create new works and thereby promotes a governmental interest that even Petitioners acknowledge to be sufficient to satisfy First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his Official Capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF DR. SEUSS ENTERPRISES, L.P., ALLENE WHITE, MADELEINE BEMELMANS, AND BARBARA BEMELMANS A.K.A. BARBARA BEMELMANS MARCIANO IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae own copyrights for children's literary works authored by Dr. Seuss, E.B. White and Ludwig Bemelmans. *Amici Curiae* are Dr. Seuss Enterprises, L.P. (owner of the copyrights of Dr. Seuss and referred to as "Seuss"), Allene White (owner of a majority of the copyrights of E.B. White ("White"), and Madeleine Bemelmans and Barbara Bemelmans a.k.a. Barbara Bemelmans Marciano (owners of the copyrights of Ludwig Bemelmans and referred to collectively as "Bemelmans"). *Amici curiae* bring a unique perspective to this matter based on their longstanding association with the advancement of creative arts through famous children's works which have brought delight to succeeding generations of children.

The Works of Dr. Seuss

Seuss is the exclusive owner of most of the copyrights in the books and illustrations of Theodor S. Geisel ("Ted Geisel"). Ted Geisel lived from 1904 to 1991. Over a 60-year period, under the pen names Dr. Seuss and Theo LeSieg, he wrote and illustrated 44 children's books and created the text of numerous others, of which more than 90 million trade book and 200 million book club copies have been sold in the United States and English-speaking Canada. His books are distributed world-wide and have been translated into 24 languages.

---

1. Counsel for *Amici Curiae* Seuss, White and Bemelmans authored this brief in its entirety. No person or entity other than the amici curiae and their counsel made any monetary contribution to the preparation or submission of the brief. Consent of the petitioners is on file with the Court and the consent of the respondent is being lodged herewith.

Dr. Seuss' mischievous Cat character with his distinctive red and white stovepipe hat from *The Cat in the Hat* is not only among the most famous and recognizable Dr. Seuss characters and images, it is among the most recognizable images in children's literature. Seuss' *The Cat in the Hat*, *Green Eggs and Ham* and *One Fish Two Fish Red Fish Blue Fish* are among the top 10 best-selling children's books of all time, and 12 of Dr. Seuss' books are among the top fifty. Seuss' work *Oh, the Places You'll Go* holds the record for the number of years it has appeared on the New York Times bestseller list for fiction (every year since first published in 1990). Dr. Seuss remains the best-selling author of children's books in the world.

E.B. White's Writings

White is the owner of a majority of the copyrights originally obtained by Elwyn Brooks ("E.B.") White. E.B. White, who lived from 1899 to 1985, authored such famous children's works as *Stuart Little* (first published in 1945), *Charlotte's Web* (first published in 1952) and *Trumpet of the Swan* (first published in 1970). White's three children's books, *Charlotte's Web*, *Stuart Little* and *Trumpet of the Swan*, have all become classics of children's literature. White's works continue to fascinate children from generation to generation.

White's writings were not limited to children's books. Prolific and versatile, he had many essays published in The New Yorker and Harpers and later republished in a series of collections, such as *One Man's Meat*, a chronicle of the first years after White's 1938 move to Brooklin, Maine, *The Points of My Compass* published in 1954 and *Essays of E.B. White* published in 1977. White contributed to the New Yorker *Talk*

of the Town section for many years. He wrote several collections of poems and short sketches. White also wrote short non-fiction books such as *Here is New York*, which was recently republished for the centennial of the consolidation of New York City, and humorous works such as *Is Sex Necessary or Why You Feel the Way You Do*, in which he collaborated with James Thurber. Also widely known for his work in the genre of composition and style, White contributed to three editions of the famous *The Elements of Style* with William Strunk, Jr.

Ludwig Bemelmans' Books

Bemelmans holds the copyrights to the works of writer and artist Ludwig Bemelmans who lived from 1898 to 1962. Ludwig Bemelmans' first children's book, *Hansi*, was published in 1934. In the late 1930's, Ludwig Bemelmans created the classic children's character Madeline. The first book in the series, *Madeline*, was published by Viking in 1939 and named a Caldecott Honor Book. Five sequels followed (*Madeline's Rescue*, *Madeline and the Bad Hat*, *Madeline and the Gypsies*, *Madeline in London* and *Madeline's Christmas*). Over the years these books have been translated into several foreign languages and have sold more than ten million copies worldwide. The *Madeline* books tell the adventures of Madeline, a young red haired girl in convent school. The *Madeline* series of books have become children's classics.

The copyrighted works by Dr. Seuss, E.B. White and Ludwig Bemelmans have educated and entertained youngsters during the authors' lives and afterwards. Works such as *The Cat in the Hat*, *How the Grinch Stole Christmas!*, *Stuart Little* and *Madeline* continue to appeal to the grandchildren and great grandchildren of the original readers.

Amici support the affirmance of the District of Columbia Circuit Court of Appeals opinion and present this brief to offer the perspective of the copyright owners for three world-renowned children's authors regarding factors pertinent to the determination of this case. As copyright owners, *Amici* represent a view that is distinct from the parties. *Amici* know first-hand how crucial the exclusive rights afforded by copyright protection are to the promotion and development of existing works. *Amici* maintain that the term extensions provided by the Copyright Term Extension Act create incentives for copyright holders to continue the development, evolution and distribution of copyrighted works, both existing and future.

SUMMARY OF ARGUMENT

The Constitution gives Congress the power "To promote the Progress of Science by securing for limited Times to Authors[] the exclusive Right to their respective Writings . . ." U.S. Const. Art. I, § 8, cl. 8. Pursuant to this Constitutional grant, Congress passed the Copyright Term Extension Act of 1998 ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (codified as 17 U.S.C. § 101, *et seq.* (1998)) which extended the term of both existing and future copyrights by an additional twenty years.

Petitioners' challenge to the constitutionality of the CTEA rests primarily on two grounds: First, Petitioners argue that the retrospective extension of existing copyrights exceeded Congress' authority under the Copyright Clause because the CTEA fails to fulfill the Constitutional mandate "*To promote . . . Progress.*" Petitioners argue that once a work has been created, the CTEA cannot possibly stimulate or encourage any further artistic creativity or induce the production of new works. (Pet. Br. at 15.)

Petitioners further argue that the term extensions afforded by the CTEA violate the First Amendment by restricting the speech of those with expectations that works would enter the public domain at some specified time. (Pet. Br. at 41.) While this Court has found that the incentive to create new works provided by copyrights justifies restrictions on speech, Petitioners conclude the CTEA can provide no such incentive because its retroactive extensions were granted long after the moment of creation and in many cases after the author's death. (Pet. Br. at 42.)[2]

The basic premise underlying both arguments is the assumption that once the initial creative effort is complete, there can be no further contribution to the creative process, at least not by the copyright holder. Relying on this assumption, Petitioners conclude that extending an existing copyright can neither promote the creative arts, nor justify a restraint on speech. (Pet. Br. at 22, 42.) This unfounded assumption is central to Petitioners' arguments for if copyright holders do, in fact, make creative use of earlier works, as *Amici* will demonstrate to be the case, then the CTEA's term extensions, both prospective and extant, necessarily afford incentives for creativity that "promote the Progress of Science" and justify the restraint of speech.

The flawed assumption on which both arguments rest is inconsistent with the realities of the marketplace for creative works. Extending the term of copyright protection can and

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2. Petitioners also argue that the CTEA's 20-year retroactive extension to the copyright term creates a perpetually expandable term that is somehow not a "limited Time." (Pet. Br. at 17-18.) Following enactment of the CTEA, copyright terms, for both subsisting and future works, remain fixed, circumscribed and "limited." Thus, a 20-year extension to a period of "limited Time" remains a "limited Time."

does encourage further creative activity by copyright holders. As demonstrated by the legislative record, copyright holders in the real world, such as *Amici* here, have distributed their works in new forms of media not available when the works were originally created. *Amici* have embellished existing works and created and developed derivative works in the form of television programs, videos, motion pictures, stage productions, interactive CD-ROMs and more. None of these activities would have occurred without the exclusivity afforded by the copyrights in the underlying work. The retroactive extensions of the CTEA were intended not to reward the past, as Petitioners suggest, but rather, as Congress reasonably concluded, to stimulate the development of future creative works.

ARGUMENT

I. *AMICI'S* EXPERIENCE SUPPORTS CONGRESS' CONCLUSION THAT EXTENDING THE COPYRIGHT TERM WOULD 'PROMOTE PROGRESS'.

Petitioners' view that the CTEA cannot stimulate or encourage the creation of new works is inconsistent with the legislative record and the experience of *Amici*. Senate Report No. 104-315 contains the Committee on the Judiciary's July 10, 1996 report on the bill that later became the CTEA. This report recited certain legislative history and explored the many considerations and rationales for enacting the CTEA. *Inter alia*, this report acknowledged that technological advancements in communications and electronic media were accelerating, causing an increased likelihood that copyright terms would be insufficient for American authors to benefit from those advancements. The Committee specifically recognized that copyright holders had incentives to create

new and derivative works and that an additional twenty years for copyright terms would increase those incentives. S. Rep. No. 104-315, at 11-12 (1996). This legislative record is consistent with *Amici's* experience.

A. Dr. Seuss

Seuss' works have been adapted into a variety of new media over the years. Having originally appeared in magazine or book form, these works have been transformed into animated television programs, videos, motion pictures, legitimate stage productions, phonograph recordings, interactive CD-ROMs, a theme park, a memorial park and a broad spectrum of learning tools and merchandise.

Seuss' classic work *How the Grinch Stole Christmas!* was first published in 1957. *The Grinch* became an animated television special produced by Metro-Goldwyn-Mayer, Inc. in 1966. This work became a big screen feature film starring Jim Carrey in 2000 — 43 years after the original publication. The 2000 Universal Studios film, directed by Ron Howard, tells the heartwarming Christmas story in an entirely new fashion. Although the 2000 *Grinch* film, which cost more than $125 million to create, is derived from the original 1957 work, it transforms the story into a new medium with a new spin, and with special effects, sets, makeup, costumes, and musical score not imaginable back in 1957. The set for the *Grinch* film was reported to be the biggest ever built at Universal Studios in Hollywood.[3]

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3. Andy Seiler, *How the Grinch Stole Hollywood*, USA Today, November 15, 2000 at 1D.

The Academy of Motion Picture Arts and Sciences recognized the *Grinch* film with three Oscar® nominations (for art direction, costume design and makeup) and the Academy Award for best makeup in film. In 2001, the *Grinch* film was released in another new format, on Digital Video Disk ("DVD") which contained bonus materials on topics such as the film's visual effects, set decoration, makeup application and makeup design, as well as outtakes, deleted scenes, recipes, music videos, an interactive play set and sing-alongs.

The release of the *Grinch* film also created renewed interest in the 1957 original work, stimulating the growth of U.S. sales of the 1957 Grinch book by more than 20% over the same period the previous year and spurring demand for publication of the original 1957 work in nine additional foreign languages.

Seuss' children's books have led to the creation of a variety of additional works in other media. The Broadway show "Seussical the Musical" debuted in 2000 at a cost of over 10 million dollars. This musical tells an entirely new story based on the characters created long ago by Dr. Seuss. The show will tour the nation beginning in September 2002, starring Cathy Rigby as the Cat in the Hat. The original cast recording from "Seussical the Musical" contains twenty-eight newly created songs, some with verses from Seuss' books as well as newly written lyrics.

The Children's Theater Company in Minneapolis, Minnesota, the largest children's theater in North America, is featuring a play based on a Seuss work in its 2002-03 season. This play, "The 500 Hats of Bartholomew Cubbins," adapts Seuss' 1938 work into a stage play with newly created

music. The Minneapolis theater also commissioned a legitimate stage version of *How the Grinch Stole Christmas*, which is not only periodically performed there, but also annually at the Old Globe Theater in San Diego.

Seuss' works also have been transformed into a children's theme park. Built at a cost of more than $100 million, "Seuss Landing" is a 15-acre section of Universal's Orlando, Florida "Islands of Adventure," where many Dr. Seuss characters are brought to life. The Seuss Landing area of the theme park is immediately recognizable to youngsters. At Seuss Landing, children can enjoy a "Caro-Seuss-el" merry-go-round and other rides derived from such famous Seuss books as *The Cat in the Hat* and *One Fish Two Fish Red Fish Blue Fish*. In addition to entertaining children, the theme park also creates and renews interest in the original Seuss works.[4] This park would never have been created had the Seuss works not been protected by copyrights.

B. E.B. White

All three of White's works have spawned recorded readings, stage plays for stock and amateur theater and motion pictures. Paramount released the motion picture *Charlotte's Web* in 1973. Columbia TriStar released the first Stuart Little film (*Stuart Little*) in 1999 and Columbia Pictures released the sequel, *Stuart Little 2*, in July 2002. Columbia TriStar released the animated film *Trumpet of the Swan* in 2001. The 1999 film *Stuart Little*, based on the 1945 work, stars

4. Seuss Landing also supports the Make a Wish Foundation and Give Kids the World programs.

Michael J. Fox as the voice for the mouse named Stuart being raised by a human family. This film is estimated to have cost more than $90 million to bring to market.

The Academy of Motion Picture Arts and Sciences nominated the 1999 *Stuart Little* film for Best Achievement in Visual Effects. Visual effects creators John Dykstra, Jerome Chen, Henry F. Anderson III and Eric Allard won this Academy Award nomination for their innovative digital creations of characters including the mouse Stuart Little. This film renewed interest in the original *Stuart Little* book and created interest in new adaptations of the original work. The success of the *Stuart Little* film led directly to the creation of yet another derivative work — the film *Stuart Little 2* — released in July 2002.

C. Ludwig Bemelmans

Bemelmans published his six *Madeline* books beginning in 1939. Madeline's popularity has continued unabated, and the original 1939 story has repeatedly been adapted in other media, including a 1952 animated short (nominated for the Best Short Subject - Cartoon Oscar® in that year) and the 1998 live-action TriStar film *Madeline*. *Madeline* animated television series have appeared on the Family Channel and ABC, and the current animated *Madeline* series, now airing on the Disney Channel, recently won the 2002 Daytime Emmy for Best Children's Animated Program. The half hour *Madeline* animations have also been produced in VHS and DVD formats.

II. CHILDREN'S BOOKS TYPICALLY TAKE DECADES TO BECOME CLASSICS AND TO GENERATE DERIVATIVE WORKS.

Successful children's books have an enduring shelf life compared to the transitory nature of most adult fiction. While it is the smash bestseller that supports adult trade fiction, it is the incremental backlist that supports children's publishing. The backbone of the backlist is, of course, the Copyright Act. One of the principle victims of a reduction in the term of copyright would be the children's book publishing industry.

CHILDREN'S BOOKS

As depicted on the chart below, it typically takes decades to bring children's classics to the large screen. Of the more than 50 children's books created by *Amici*, White's *Charlotte's Web* was the only book to have a children's film produced during its author's lifetime.

Title	Author	Year Of Publication	Year Of Motion Picture	Years Between Publication And Motion Picture Release
How the Grinch Stole Christmas	Dr. Seuss	1957	2000	43
The Cat in the Hat	Dr. Seuss	1957	2003	46
Charlotte's Web	E. B. White	1952	1973	21
Stuart Little	E. B. White	1945	1999	54
Trumpet of the Swan	E. B. White	1970	2001	31
Madeline	Ludwig Bemelmans	1939	1998	59

Title	Author	Year Of Publication	Year Of Motion Picture	Years Between Publication And Motion Picture Release
The Wizard of Oz	Frank Baum	1900	1925 (1st pic)	25
Dr. Doolittle	Hugh Lofting	1922	1967	45
Mary Poppins	P. L. Travers	1934	1964	30
Lord of the Rings	J. R. R. Tolkien	1954	2002	48
James and the Giant Peach	Roald Dahl	1961	1996	35

It is the continued existence of exclusive copyrights for these classic works, decades after their initial publication, that provides the incentive to the producers of these films to devote the immense resources necessary to bring the *Grinch*, *Stuart Little* and *Madeline* works into the medium of modern day feature films or to invest millions to create musicals for the legitimate stage. It is the exclusivity of copyright protection that provides the incentive for the producers of other derivative works to invest the capital to transform these books into new media.

In order to compete for the interest of the viewing public, films like *Men in Black*, *Spiderman*, and *Star Wars* create demand for movies with cutting-edge sets and special effects, all of which come at significant cost. Had the original *Grinch* and *Stuart Little* works already been in the public domain, the producers and film studios would never have invested a hundred million dollars or more to bring the adaptations of these works to the big screen with such dramatic and award-winning special effects. Moreover, without copyrights, there is no ability to maintain control over the quality of the work or to manage the merchandising that accompanies such movies and which provides an important secondary source of revenues, reducing the risk of the initial investment.[5] In light of the legislative record and publicly available information, Congress reasonably understood that without the exclusivity

5. The Committee on the Judiciary specifically recognized the desire to allow copyright holders to maximize the return on creative investment by exploiting their works throughout the course of the works' marketable lives. S. Rep. No. 104-315, at 11-12 (1996). Similarly, the Brief of Amicus MPAA further documents Congress' desire to provide financial incentives to copyright holders to create new works as well as to restore existing works such as films.

of copyrights movie studios are far less likely to gamble on these ventures which add so much to the creative arts.[6]

As a further example, Universal Pictures, DreamWorks Pictures and Imagine Entertainment are currently making a feature film live-action adaptation of Dr. Seuss' 1957 work *The Cat in the Hat*. The film version of the 1957 work *The Cat in the Hat*, starring Mike Myers in the title role, is projected for a 2003 release. It will require a significant investment to bring this film to market. Without the exclusive rights afforded by copyrights, this work would not be made.

III. CONGRESS REASONABLY FOUND THAT THE TERM EXTENSIONS OF THE CTEA DO "PROMOTE THE PROGRESS OF SCIENCE."

A. The Promotion of Progress Occurs Through the Creation of New Works as Well as Through Enhancement of Knowledge.

The Copyright Clause gives Congress the power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and

6. Congress recognized the need to provide incentive to motion picture studios and publishers to take risks in financing films by extending the terms of copyrights. The Committee on the Judiciary reported that "extended protection for existing works will provide added income with which to subsidize the creation of new works." S. Rep. No. 104-315, at 11-12 (1996). Although the examples the Committee referenced were the financing of marginal works and works of young or emerging authors, the principle applies equally to financing films of famous children's works based upon the great risk taken to bring these works to the big screen.

> Inventors the exclusive Right to their respective Writings and Discoveries;

U.S. Const. Art. I, § 8, cl. 8. As noted by Petitioners, this Court has said the words "To promote . . . Progress" means to stimulate, encourage or induce artistic creation, *Goldstein v. California*, 412 U.S. 546 (1973); to stimulate artistic creativity, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), or to "motivate the creative activity of authors," *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 546 (1985) (citing *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984)). This Constitutional phrase is not, however, limited solely to the creation of incentives. It also means the enhancement of knowledge.[7] The Copyright clause was intended to advance knowledge and the public welfare.[8] *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Harper & Row* 471 U.S. at 558. Congress thus fulfills its Constitutional mandate to "promote . . . Progress," by spurring the creation of new works as well as by encouraging the broad dissemination of existing works and other acts that enhance knowledge. As demonstrated by the legislative record as well as Amici's experience, the exclusivity afforded by copyrights does stimulate the creation of new works as well as the enhancement of knowledge and the public good.

7. At the time of the framing, the term "science" meant "knowledge." The power to promote knowledge was through the exclusive grant known as a copyright. The useful Arts were to be promoted through the exclusive grant known as a patent. Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective*, 83 J. Pat. & Trademark Off. Soc'y 763, 781 (2001).

8. *Id.* at 769-770, citing Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in The Republic of Letters 630 n.11 (James Morton Smith, ed., 1995).

Amici have over the years undertaken significant efforts that have enhanced both knowledge and the public good. Works by Ted Geisel, E.B. White and Ludwig Bemelmans promote children's literacy and the love of reading. Ted Geisel won the 1984 Pulitzer Prize for his special contribution to the education and enjoyment of America's children and their parents. The National Education Association celebrates Dr. Seuss' birthday with its annual Read Across America day during which children throughout the nation read Dr. Seuss' books. Approximately 40 million people participated in the March 2002 event. In 1999, the Cat in the Hat was selected by school children of America for depiction on a postal stamp and was the only book character so honored.

Seuss' *The Lorax* is widely used for imparting to children lessons regarding the environment and conservation. Seuss granted the United Nations the gratis right to create a special edition of *The Lorax* for worldwide distribution in connection with a 1983 conservation campaign.

In 1997, Seuss allowed the United States Centers for Disease Control and Prevention the free right to use Seuss' 1939 work *The King's Stilts* and a variety of other books for a two-year poster campaign. This initiative encouraged parents to have their children inoculated as part of the Department of Health and Human Services' national Dr. Seuss Immunization Awareness Campaign. This campaign featured Seuss characters that told immunization stories in rhyme in order to increase childhood immunization rates while reducing the rates of vaccine preventable childhood illnesses. The CDC characterized the Seuss posters as incredible tools to promote immunization awareness.

In 1997, Seuss donated rights for the creation of a Dr. Seuss interactive learning exhibit at the Children's Museum of Manhattan. This exhibit, featuring displays based on Seuss works such as *The Cat in the Hat* and *Green Eggs and Ham*, drew 700,000 visitors in its two year run at the Children's Museum of Manhattan. The exhibit has since toured 11 other children's museums around the United States and has attracted over 2 million visitors.

As a contribution to the economic rejuvenation of Springfield, Massachusetts, Ted Geisel's hometown, Seuss participated in the creation of a multimillion-dollar Dr. Seuss National Memorial sculpture garden, which opened in June 2002. The garden consists of bronze replicas of Mr. Geisel and many of his most popular characters erected in the quadrangle of the Springfield library and museums. [9]

The efforts of Seuss, White and Bemelmans demonstrate that copyright holders contribute to the promotion of the progress of science, in many different ways, long after a work's original publication.

B. Enriching the Public Domain Was Not the Framer's Purpose.

While there may be little record of what the Framers intended by the phrase "to promote the Progress of Science and useful Arts,"[10] they perceived that putting works directly into

9. The Seuss works also fund a foundation which supports a variety of philanthropic activities and medical and academic institutions. Participation in royalties provides one of the largest alumni contributions to Dartmouth College (Ted Geisel's alma mater). In 1995, Ted Geisel's widow provided a multi-million dollar endowment for the libraries at the University of California, San Diego.

10. Walterscheid, *supra*, at 766, 774-775.

the public domain would not achieve this end.[11] Otherwise, there would be no need for a Copyright Clause, and works would go directly into the public domain upon creation.[12] Thus, the very existence of the Copyright Clause belies Petitioners' argument that the Progress of Science is not promoted until works reach the public domain.

While Petitioners contend that the CTEA denies a generation of creative work to another generation of creators (Pet. Br. at 18), this argument is simply a red herring, as Petitioners themselves are not creators. They do not create something "new to the world"; rather, they merely seek to repackage and redistribute, sometimes by electronic means, the works of others. While in no way seeking to disparage the intent of Petitioners, others having access to works through the public domain make use of well-known characters to glorify drugs or to create pornography. These uses, especially for children's works, demean and dilute the original works and discourage their continued popularity. In passing the CTEA, Congress, like the Framers, understood that putting works in the Public Domain does not *ipso facto* "promote . . . Progress."

11. *Id.* at 770.

12. While, apparently, this would have been Jefferson's preference, since he believed that government should neither restrain nor aid its citizens in their individual pursuits, Jefferson was serving as Minister to France and played no active part in drafting the Constitution. In contrast, Madison, who was one of the Framers and a supporter of the clause, advocated the need to protect the few from the dictates of the many, expressing the view that copyrights and patents were monopolies that should be tolerated because of the public good they could produce. Walterscheid, *supra*, at 769-770.

C. The Incentives of the Copyright Term Extension Act Promote the Creation of New Works.

Petitioners argue that the extension of existing copyrights cannot promote the Progress of Science because, no matter what is offered to Hawthorne, Hemingway or Gershwin, they will not produce anything more. (Pet. Br. at 22.) The incentives of the CTEA, they contend, are given for work that has already been produced. Petitioners' argument in this regard is unfounded. As discussed above, this argument is contrary to the legislative record and the experience of *Amici*. The legislative record demonstrates that by extending copyright terms, Congress specifically sought to "increase existing incentives to create new and derivative works." S. Rep. No. 104-315, at 12 (1996). The term extensions of the CTEA do provide incentives for copyright holders to further develop creative works that otherwise would not be created, as well as to distribute existing works in new forms of media.

IV. NEITHER COPYRIGHT LAW IN GENERAL NOR THE CTEA IMPINGE ON THE IMPORTANT RIGHTS ASSOCIATED WITH THE FIRST AMENDMENT.

A. Petitioners' First Amendment Position is Fundamentally Flawed.

Petitioners' First Amendment arguments are fundamentally flawed. Petitioners erroneously argue that the term extensions of the CTEA are subject to First Amendment challenge because they restrict the speech of those who anticipate that works would soon fall into the public domain. (Pet. Br. at 39-41.) Although Petitioners recognize that this Court has found the incentive to

create new works provided by copyrights justifies such a restriction, they simply conclude that Congress could not reasonably have believed that the CTEA advanced copyright holders' incentive to create.

Notwithstanding Petitioners' denial, the legislative record demonstrates that Congress had a reasonable basis to conclude that the enactment of the CTEA would increase the existing incentives to create new and derivative works. S. Rep. No. 104-315, at 12 (1996). Petitioners' unfounded contention that copyright holders are no more likely to make creative use of earlier works than those like Petitioners (who only republish or copy the works of others) is both inaccurate and without support, as demonstrated by *Amici*'s various experiences set forth herein. As noted previously, the motion picture of *Charlotte's Web* was released in 1973. The *Madeline* story first became an animated short film in 1952 and the feature film *Madeline* was released in 1998. Six weeks before the CTEA was enacted in October, 1998, Seuss publicly announced that its 1957 work *How the Grinch Stole Christmas!* was being made into a full-length feature film.[13] Congress had ample evidence from which to conclude that extending the exclusivity afforded by copyrights would provide copyright holders with further incentives to create new works.

The CTEA also meets First Amendment scrutiny under the authorities cited by Petitioner. Petitioner cites to *Harper & Row*, 471 U.S. at 558, for the proposition that copyright law may be upheld against First Amendment challenge only insofar as it protects an "engine of free expression." As demonstrated above, *Amici* Seuss, White and Bemelmans have all shown that their existing copyrights have served as just such an "engine of expression."

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13. The Associated Press, *Universal Strikes Deal for Dr. Seuss*, AP Online, September 16, 1998, available on Westlaw.

B. The Constitutional Interests at Stake Under the First Amendment Challenge to the CTEA are Protected by the Idea/Expression Dichotomy, Fair Use and Parody Law.

Copyright law — whatever the duration of the limited term — only provides specific and limited rights. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984); *Twentieth Century Music*, 422 U.S. at 155. The tensions between those rights and the First Amendment have long since been resolved. This Court has held that First Amendment rights are protected by (1) the "idea/expression dichotomy, i.e., the fact that copyright only prohibits the copying of actual "expression" and not "ideas" under 17 U.S.C. § 102(b); and (2) the provision for fair use of copyrighted works under 17 U.S.C. § 107. *Int'l News Service v. Associated Press*, 248 U.S. 215, 234 (1918); *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971), *Harper & Row*, 471 U.S. at 556. *Amici* submit that these fundamental copyright principles fully address legitimate First Amendment concerns.

What Petitioners seek is not traditional First Amendment protection for their own words and expression but, rather, the right to make commercial use of the protected expression of others. Petitioners offer no support or authority, nor is there any, for such a right. Quoting *Sony*, Petitioners contend that the idea/ expression dichotomy and fair use limitations are irrelevant to First Amendment interests "protected by the limitation on the duration of copyrights." (Pet. Br. at 36.) The reason for this argument is simple. Whatever the length of the copyright term, Petitioners' proposed uses would not be protected by traditional notions of fair use.

Petitioners seek to use protected works for commercial purposes or in ways which would substantially impact the market for and value of the work. Fair use, however, requires consideration of the commercial nature of the proposed use and the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107(1),(4); *Sony*, 464 U.S. at 450; *Harper & Row*, 471 U.S. at 562. *Sony*, then, does not support Petitioners' contention, because the use at issue in *Sony* — the time-shifted viewing of broadcast television shows afforded by video recorders — was found to have no demonstrable effect on the market for or value of the copyrighted works. *Sony*, 464 U.S. at 450. This Court noted in *Sony* that if the video recorder were used for a commercial or profit-making purpose, such use would be "presumptively unfair." *Id.* at 449. The same would be true here where Petitioners' proposed uses include republication of others' works and making such works freely available on the Internet. Such uses would unquestionably have a dramatic effect on the market for and value of the work in question. Contrary to Petitioners' argument, their problem is not that fair use does not adequately protect First Amendment interests, but rather that Petitioners' proposed commercial uses would not qualify as a fair use.

1. The Idea-Expression Dichotomy Addresses First Amendment Concerns.

Copyright law prevents the unauthorized copying of protected expression. The "idea/expression dichotomy" of copyright law addresses First Amendment rights in the context of copyrighted works. *Harper & Row*, 471 U.S. at 556. Under the "idea/expression dichotomy," ideas are free for all to use but particular expressions of ideas are subject to copyright protection. 17 U.S.C. § 102(b). Copyright law

would not prevent Petitioners from creating new works about cats, mice, or redheaded young girls so long as such new works are not substantially similar to the protected expression in *The Cat in the Hat*, *Stuart Little* or *Madeline*.

Thus, in the business world, the "idea/expression dichotomy" allows for First Amendment expression while preserving protected expression for limited times. In the marketplace for children's literature, a reader may choose from stories about Beatrix Potter's Peter Rabbit, Warner Brothers' Bugs Bunny, Anita Jeram's Big Nutbrown Hare, Donna Green's Velveteen Rabbit, and Margaret Wise Brown's Runaway Bunny.

Likewise, children interested in stories about mice can select from White's Stuart Little, Disney's Mickey Mouse, Lucy Cousins' Maisy, and Katharine Holabird's Angelina. Seuss' *The Cat in the Hat* co-exists with Richard Scarry's extensive works about cats named Huckle, Sally, Daddy Cat and Mummy Cat. It is at least in part because of the protection of particular expression under copyright that authors set out to develop entirely new works. The variety of works on these same subjects demonstrates the vitality of First Amendment rights.

2. Fair Use and Parody Law Also Protect First Amendment Interests in Copyrighted Works.

The copyright laws specifically provide that the fair use of copyrighted works includes uses for purposes of "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. None of these uses constitutes copyright infringement.

Parody is one example of fair use that demonstrates the protection of speech by the First Amendment, which the copyright laws would not inhibit. "Parody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment." *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997).

As demonstrated by this case, the current system which balances the interests of the author against limits on free speech is clearly working. "Copyright law accommodates the concerns of the First Amendment through its exclusion of protection for ideas, and through the fair use doctrine." *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1575 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997). In *Penguin Books*, the district court enjoined publication of *The Cat NOT in the Hat*, a story of the O.J. Simpson murder trial set in Seussian-like prose, based on findings of a strong likelihood of success on Seuss' claim of a substantial taking of protected expression. *Id.* at 1562.

The Ninth Circuit affirmed the district court. *Id.* After evaluating the application of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Ninth Circuit found the work failed to qualify as a parody of *The Cat in the Hat*; instead, it parodied the Simpson trial.

This experience demonstrates the co-existence and interaction of First Amendment rights with copyright laws. Some copying falls outside the protections of copyright law and into the arena of fair use and parody. When this occurs, the First Amendment prevails. Otherwise, authors' limited rights are protected by copyright law as provided by the United States Constitution, Article I, Section 8, Clause 8.

Thus, the existing framework in United States copyright law — which allows the free use of ideas, and which has exceptions for fair use and parody — sufficiently addresses legitimate First Amendment concerns. What is plainly not addressed by this framework is what Petitioners seek here, the reallocation of the right to speak, favoring Petitioners, and substituting Petitioners' judgment for that of Congress. As Petitioners concede, such a reallocation of rights is not sanctioned by the First Amendment. (Pet. Br. at 41.)

CONCLUSION

The United States copyright system, as amended by the CTEA, works in real life under the Constitutional framework put into place more than two hundred years ago. With the CTEA, copyrights continue to exist for "limited times." Copyright owners continue to promote the progress of science and useful arts throughout the limited terms of copyrights. In enacting the CTEA, Congress considered Petitioners' arguments and rejected them. Nothing about the copyright laws — or the CTEA — impinges on any First Amendment rights. The ruling of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, ET AL.,

Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RECORDING ARTISTS COALITION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

This brief *amicus curiae* in support of Respondents is submitted by the Recording Artists Coalition ("RAC") pursuant to Rule 37 of the Rules of this Court. Founded in 1998, RAC is a non-profit public advocacy organization comprised of over 130 well-known featured recording artists, including Tony Bennett, Clint Black, Alanis Morissette, Jimmy Buffet, Sheryl Crow, Don Henley, Billy Joel, Stevie Nicks, Bonnie Raitt, Bruce Springsteen, and Trisha Yearwood. RAC is primarily concerned with business and political issues affecting the interests of featured recording artists, both on a federal and state level. RAC urges the Court to uphold the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

Featured recording artists create sound recordings. Pursuant to the U.S. Copyright Act they are, in most instances, the original authors and owners of sound recording copyrights.[2] The Sony Bono Copyright Term Extension Act of 1998 ("CTEA")[3] provides featured recording artists, their assigns, successors, and/or heirs, an additional 20 years of copyright protection for sound recordings created prior to

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[1] No counsel for a party authored this brief in whole or part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. The parties have consented to filing of this brief.

[2] Copyright Act of 1976 (as amended), 17 U.S.C., §§114 et seq.

[3] Pub. L. No. 105-298, 112 Stat. 2827 (1998). The CTEA may be particularly valuable to sound recording artists as opposed to other types of artists because, although the issue is not yet settled, it appears that sound recordings do not qualify as works for hire, so sound recording artists are entitled to the so-called "termination right" under the Copyright Act of 1976, 17 U.S.C. §§304 et seq.

and after the passage of CTEA If this Court rules in favor of Petitioners, featured recording artist's copyright ownership rights would be adversely affected. Such a ruling would also act as a disincentive for recording artists and their progeny to create new and enhance already existing sound recordings.

SUMMARY OF ARGUMENT

The CTEA is constitutional because it encourages both artists and their heirs to preserve and enhance existing art and to create new art.

Artists respond to economic incentives. Living artists know that when a work already created is granted an additional 20 years of protection the artist has an asset of greater value. The additional protection gives the artist an incentive not only to create new art but to preserve and enhance the already created art for himself and his heirs. Artists know, or at least believe, that the public domain industry does not preserve and enhance art as well as heirs do.

The heirs of living artists do not just reap the benefits of the artists' work. They maintain the value of the art and sometimes add new works of art based on the deceased artists' work. The example of Eva Cassidy, an artist obscure at her death, whose world-wide reputation was created by her heirs after her death, illustrates this point. A second example is Natalie Cole's digital creation of Grammy award-winning duets with her father, Nat King Cole, 40 years after the original recordings were made.

ARGUMENT

I. INTRODUCTION

Petitioners, and *amici* supporting Petitioners, argue that the CTEA's retroactive grant of a twenty year extension to already existing copyrights does not promote the useful arts and sciences, because the public receives nothing in return. Therefore, Congress has exceeded its Constitutional authority to create copyright monopolies for a "for limited Times" "to promote the Progress of Science and useful Arts." Petitioners' Brief, pp. 2, 23-28; see Petition for Certiorari, p. 6, n.3; Brief of American Association of Law Libraries, et al., in Support of Petition, p. 3.

RAC submits this brief to show how CTEA's copyright extension for both pre-existing and future works motivates recording artists (as well as all authors of copyrightable work) and their heirs to create new works and to enhance pre-existing works. Thus, even if the court of appeals' primary holding, that the CTEA is constitutional - whether or not it promotes the useful arts and sciences - is wrong, the judgment of the court of appeals should be affirmed because its alternative holding, that Congress had a basis for finding that CTEA promotes the useful arts and sciences, is clearly correct.[4]

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[4] See Eldred v. Reno, 239 F.2d 372, 378- 380 (D.C.Cir. 2001).

II THE CTEA PROMOTES THE USEFUL ARTS AND SCIENCES BY PROVIDING ECONOMIC INCENTIVE TO LIVING ARTISTS TO PRESERVE AND CREATE ART.

While it is romantic to conjure up the image of the "starving artist" creating art in the face of abject poverty, as those who work with artists know quite well, the reality is that an artist will only devote himself to art so long as the art provides remuneration for the basic necessities of life and. in most cases, for his or her progeny after the artist is gone. Whatever else it may be, art is almost always a business.

Even the Petitioners appear to concede that providing an additional 20 years to works yet to be created is constitutionally valid and defensible. However, they do not accept, nor does Judge Sentelle in his dissent accept,[5] the premise that adding an additional 20 years to works already created provides motivation to a living artist.

RAC cannot agree. A living artist will surely recognize that when a work already created is granted an additional 20 years of protection that additional protection increases the present value of the asset as well as the value of the asset that the artist leaves to his heirs. The artist will also recognize that the heirs will have additional time and incentive to maintain and enhance the quality of the art and the artist's legacy. The increase in the value of the art, even though already created, will - simply as a matter of economic rationality - motivate the artist to preserve and enhance it. Better care is usually taken of more valuable than less valuable possessions.

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[5] Eldred, supra, at 380-384.

In RAC's view, providing an artist or an heir with additional income based on his art will almost always encourage the artist or heir to create additional and preserve existing art. Whether the artist is dead or alive, or whether the art has already been created or will be created, without hands-on maintenance by the artist or his heirs, the value of art will not be maximized.

Allowing works to fall into the public domain, on the other hand, rarely enhances the quality of a work of art or the legacy of any particular artist.[6] The public domain industries show little interest in maintaining quality in an artist's original or derivative works or in perpetuating the historical legacy of an artist. Such industries, unprotected by an exclusive license, are naturally interested in short term profit, not in nurturing and enhancing the value of a work of art over time.

Even if this perception of the public domain industries is wrong, it is a perception generally shared by recording artists. Thus, the realization that copyright law now provides an additional 20 years of protection spurs the artist not only to create new art but to preserve and enhance existing art.

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[6] Although not in issue here, falling into the public domain also has a questionable effect on a work's level of distribution. Many works of art simply disappear without the support of an interested heir of the artist.

III. THE CTEA PROMOTES THE USEFUL ARTS AND SCIENCES BY PROVIDING ECONOMIC INCENTIVE TO THE ARTIST'S HEIRS TO PRESERVE AND CREATE ART.

Petitioners ignore the value that heirs often add to the value of an artist's body of work.[7] Heirs license the art and authorize the creation of derivative works. Heirs, or those working on behalf of the heirs, are in the best position to maintain value by judiciously licensing the art and authorizing the creation of derivative works. Much time and effort is necessary to manage the legacy of an artist. The heirs are uniquely situated with the requisite knowledge and familial interest to maximize the value of the artist's estate and enhance the legacy of the artist. The CTEA encourages this activity.

To illustrate this point, the Court should take notice of Eva Cassidy. Eva Cassidy has recently become an international star. Her album Songbird was the number one album in the United Kingdom for weeks in 2001. Her recorded performance of the song "Somewhere Over the Rainbow" also attained number one status in the United Kingdom in 2001 and was voted by the BBC audience one of the 100 most important recorded performances of the 20th Century. Cassidy has also attained a legendary status in the United States, and her legacy continues to grow. See www.evacassidy.org.

The relevant point about Eva Cassidy is that she has been dead for almost six years – having been struck down by cancer at the age of 33. When she died, she was an obscure,

[7] See Petitioners' Brief, p. 25-26, suggesting that seeking to extend the term of copyright for already existing work is "rent-seeking" behavior.

though greatly loved and respected, Washington DC based, recording artist, having released only one solo album, Eva Cassidy Live at Blues Alley. Her awesome talent was appreciated by very few. The album, Songbird, consisting in part of tracks not yet released when she died, was a work of art created in part by her heirs after her death.

If not for the tireless work of her heirs (in this instance her parents), her producer, her band, and the independent record company releasing her product in new and varied forms, the world, we submit, would never have taken notice of or been exposed to this extraordinary talent. Had her legacy of sound recordings fallen into the public domain, her heirs would have lacked the economic incentive to work to preserve her artistic legacy, and the licensee record company would not have invested the necessary money

The CTEA provides heirs not only with incentives to preserve works already created but not yet published by deceased artists but to create additional works and derivatives of published works. Examples are the audio and visual performances of Natalie Cole in "Unforgettable" (1991) and "When I Fall in Love" (1996), which she created by digitally mixing her performances with performances more than 40 years before of her deceased father, Nat King Cole. What had previously been a solo performance became a duet between father and daughter. Natalie Cole won Grammy awards for both performances. See www.grammy.com. We think it fair to say that Nat King Cole's legacy was greatly enhanced by this collaborative effort.

CONCLUSION

For the reasons set forth above, the CTEA promotes the useful arts and sciences. It is therefore constitutional. In consequence, this Court should affirm the judgment of the court of appeals.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* SYMPHONIC AND CONCERT COMPOSERS JACK BEESON, CHEN YI, JOHN CORIGLIANO, JOHN DUFFY, HAROLD FARBERMAN, PHILIP GLASS, ADOLPHUS HAILSTORK, JENNIFER HIGDON, LIBBY LARSEN, TANIA LEÓN, STEPHEN PAULUS, GEORGE ROCHBERG, NED ROREM, AUGUSTA READ THOMAS, MELINDA WAGNER AND RICHARD WERNICK IN SUPPORT OF RESPONDENT

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In his official capacity as Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* SYMPHONIC AND CONCERT COMPOSERS JACK BEESON, CHEN YI, JOHN CORIGLIANO, JOHN DUFFY, HAROLD FARBERMAN, PHILIP GLASS, ADOLPHUS HAILSTORK, JENNIFER HIGDON, LIBBY LARSEN, TANIA LEÓN, STEPHEN PAULUS, GEORGE ROCHBERG, NED ROREM, AUGUSTA READ THOMAS, MELINDA WAGNER AND RICHARD WERNICK IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE* [1]

Jack Beeson, Chen Yi, John Corigliano, John Duffy, Harold Farberman, Philip Glass, Adolphus Hailstork, Jennifer

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part. The only entity, other than the named *amici curiae* and their counsel, to make a monetary contribution to the preparation and submission of this brief is the American Society of Composers, Authors and Publishers (hereinafter "*ASCAP*").

Higdon, Libby Larsen, Tania León, Stephen Paulus, George Rochberg, Ned Rorem, Augusta Read Thomas, Melinda Wagner and Richard Wernick submit this brief as *amici curiae* in support of Respondent pursuant to Rule 37 of the Rules of the Court. All of the *amici* are distinguished composers of symphonic and concert (sometimes called "serious" or "classical") music, and include four Pulitzer Prize winners and Oscar, Golden Globe, Emmy and Grammy winners.

Jack Beeson is best known for his works, *Hello Out There*, a one act chamber opera produced by the Columbia Theater Associates in 1954, and *Lizzie Borden*, commissioned by the Ford Foundation for the New York City Opera and premiering in 1965. He is presently MacDowell Professor of Music Emeritus at Columbia University, where he taught for half a century.

Chen Yi was born in China. After a period of enforced labor during the Cultural Revolution (during which time classical music was forbidden), she became a concertmaster and composer with the Beijing Opera Troupe. She continued her studies in the United States, receiving her Doctor of Musical Arts degree from Columbia University in 1993. She has been appointed Composer-in-Residence for the Women's Philharmonic, Chanticleer and the Aptos Creative Arts Program in San Francisco, and has taught at the Peabody Conservatory and the UMKC Conservatory (as Cravens/Millsap/Missouri Distinguished Professor in Composition). In 2001, she received the Ives Living Award (2001-2004) from the American Academy of Arts and Letters. She also has received the Lili Boulanger Award and the CalArts Alperts Award for Music, fellowships from the Guggenheim Memorial Foundation, the American Academy of Arts and Letters, and grants from the National Endowment for the Arts, the Mary Flagler Cary Charitable Trust, the Fromm Music Foundation and the Koussevitzky Foundation.

John Corigliano won the Oscar in 2000 for best film score for *The Red Violin*, and the Pulitzer Prize for his *Symphony No. 2* in 2001. *Symphony No. 1*, Corigliano's personal response to the AIDS crisis, won music's Nobel Prize—the 1991 Grawemeyer Award for Best New Orchestral Composition.

John Duffy, among his numerous other awards, has won two Emmys, an ASCAP award for special recognition in film and television music, a New York State Governor's Art Award and the (New York City) Mayor's Award of Honor for Arts and Culture. He is founder of Meet the Composer, an organization dedicated to the creation, performance, and recording of music by American composers.

Harold Farberman's very first work, *Evolution*, written in 1954, has been recorded four times, once by Leopold Stokowski. In 1956 his *Quartet for Flute, Oboe, Viola and Cello* received first prize in the New England Composer's Competition. In 1957 *Greek Scene* was chosen to represent the United States in an International Composer's Symposium held in Paris. For his dedication to the music of Charles Ives through performance and recordings, Farberman was awarded the Ives Medal. He is the founder of the Conductors Guild and also created the Conductors Institute, the premiere training ground for young conductors from around the world.

Philip Glass has collaborated with a variety of artists in a range of media including opera (*Satyagraha, Akhnaten, The Making of the Representative for Planet 8, The Fall of the House of Usher, Hydrogen Jukebox and The Voyage*), film (*Koyaanisqatsi, Mishima, Powaqqatsi, A Brief History of Time, Candyman, The Thin Blue Line, Kundun, Dracula, The Truman Show*), dance (*A Descent into the Maelstrom, In the Upper Room*), theatre works (*The Photographer, 1000 Airplanes on the Roof, The Mysteries, What's so Funny?, Orphée, La Belle et La Bête, Les Enfants Terribles*), cooperative recording projects (*Songs from Liquid Days,*

Passages), orchestral works (*Itaipu, Symphony No. 2, Symphony No. 3, the "Low" and "Heroes" symphonies, Symphony No. 5—Requiem, Bardo and Nirmanakaya*). In 2000, he was awarded the George Peabody Medal for Outstanding Contributions to Music in America. His original music for the *Truman Show* won a Golden Globe award for Best Score in 1999.

Adolphus Hailstork's *Out of the Depths* won the 1997 Belwin-Mills Max Winkler Award presented by the Band Directors National Association; his *American Guernica* received first prize in the Virginia College Band Directors' 1983 national contest; and *Mourn Not the Dead* received the 1971 Ernest Bloch Award for choral composition. He is a Professor of Music and Eminent Scholar at Old Dominion University.

Michael Hersch has received the American Composers Prize (1997), the Guggenheim Fellowship (1997), the Prix de Rome (2000) and the Berlin Prize (2001). He also has received awards from the American Academy of Arts & Letters, the New York Youth Symphony's First Music prize, two Meet the Composer grants, three ASCAP Young Composer Awards and five ASCAP Foundation grants. He was selected as the Pittsburgh Symphony Orchestra's Composer of the Year for the 2002-2003 season.

Jennifer Higdon's work, *Shine* (commissioned by the ASCAP Foundation), was named Best Contemporary Piece of 1996 by *USA Today* in their year-end classical picks. She has received awards from the Guggenheim Foundation, the American Academy of Arts & Letters, the Pew Fellowship in the Arts, the International League of Women Composers, Composer, Inc., the University of Delaware New Music Competition, the Louisville Orchestra New Music Search, the Cincinnati Symphony's Young Composer's Competition, NACUSA, and ASCAP. She has received grants from the

National Endowment for the Arts, Meet-the-Composer, and the Pennsylvania Council on the Arts. She is currently on the composition faculty of the Curtis Institute of Music.

Libby Larsen has received numerous awards, including a 1994 Grammy as producer of the CD *The Art of Arleen Augér*. an acclaimed recording that features Larsen's *Sonnets from the Portuguese*. Her opera *Frankenstein, The Modern Prometheus* was selected as one of the eight best classical music events of 1990 by *USA Today*. She was the first woman to serve as a resident composer with a major orchestra, and has held residencies with the California Institute of the Arts, the Arnold Schoenberg Institute, the Philadelphia School of the Arts, the Cincinnati Conservatory, the Minnesota Orchestra, the Charlotte Symphony and the Colorado Symphony. In 1973, she co-founded (with Stephen Paulus) the Minnesota Composers Forum, now the American Composers Forum.

Tania León was born in Havana, Cuba and came to the United States in 1967. She became a founding member and the first musical director of the Dance Theatre of Harlem in 1969. Her orchestral work *Horizons* was written for the NDR Symphony Orchestra in Hamburg and was premiered there in July 1999. Her opera *Scourge of Hyacinths* was commissioned by the Munich Biennale in 1994, where it won the BMW Prize as best new work of opera theatre. She has received awards for her compositions from the American Academy of Arts and Letters, the National Endowment for the Arts, Chamber Music America, the Lila Wallace/Reader's Digest Fund, NYSCA, ASCAP, and Meet the Composer, among others. She is a Professor of Music at Brooklyn College.

Stephen Paulus' opera, *The Postman Always Rings Twice* was the first American opera to be performed at the Edinburgh Festival. He has written five other operas and has received Guggenheim and NEA Fellowships, as well as

commissions from the New York Philharmonic, Cleveland Orchestra, Juilliard Opera Center, The Festival Singers and many others. He is co-founder and a current Board Vice President of the American Composers Forum, the largest composer service organization in the world.

George Rochberg's 1971 *Third String Quartet* was critically acclaimed by the *San Francisco Examiner* as "the work that defines the attitudes of a generation of composers." He is the recipient of numerous awards, grants and fellowships, including the Alfred I. du Pont Award for Outstanding Conductors and Composer (Delaware Symphony), Elected Fellow of the American Academy of Arts and Sciences, the Gold Medal Brandeis Creative Arts Award, the American Academy of Arts and Letters, First Prize Kennedy Center Friedheim Award, two Guggenheim Fellowships, the George Gershwin Memorial Award, and the Fulbright Fellowship. He taught at Curtis Institute of Music from 1948 to 1954. In 1960, he joined the faculty of the University of Pennsylvania, where he served as chairman of the Department of Music until 1968. He retired from teaching in 1983 as Emeritus Annenberg Professor of the Humanities.

Ned Rorem's suite *Air Music* won the 1976 Pulitzer Prize in music. The Atlanta Symphony recording of the *String Symphony, Sunday Morning*, and *Eagles* received a Grammy Award for Outstanding Orchestral Recording in 1989. He has been the recipient of a Fulbright Fellowship (1951), a Guggenheim Fellowship (1957), and an award from the National Institute of Arts and Letters (1968).

Augusta Read Thomas has received numerous prizes and awards from, among others, ASCAP, BMI, the National Endowment for the Arts, the American Academy and Institute of Arts and Letters, the John Simon Guggenheim Memorial Foundation, the Koussevitzky Foundation, the New York Foundation for the Arts, the John W. Hechinger

Foundation, the Kate Neal Kinley Foundation, The Debussy Trio Music Foundation and Thomas van Straaten, Columbia University (Bearns Prize), the Naumburg Foundation, the Fromm Foundation, the Barlow Endowment, Harriett Eckstein, the New York State Council for the Arts, and Chamber Music America. She was the recipient of the Third Century Award from the Foundation for a Creative America. She received fellowships from the Bunting Institute of Radcliffe College, the Rockefeller Foundation (Bellagio), the International Rotary Foundation, L'Ecole Normal in Fountainbleau, France, Tanglewood Music Center, the Gaudeamus Foundation, the Wellesley Composers Conference, and the Atlantic Center for the Arts and the Aspen Music Festival. She is currently a Professor on the composition faculty at Northwestern University and the Composer-in-Residence of the Chicago Symphony Orchestra.

Melinda Wagner was awarded the Pulitzer Prize in music in 1999 for her *Concerto for Flute, Strings, and Percussion*, and her works have been performed by the Chicago Symphony Orchestra, American Composers Orchestra, the Chamber Music Society of Lincoln Center, the New York New Music Ensemble, and the Society for New Music. She is the recipient of numerous honors including fellowships from the Guggenheim Memorial Foundation and the Howard Foundation (Brown University), grants from the Illinois Arts Council and the New York State Council on the Arts, three ASCAP Young Composer Awards, and resident commissions from the Barlow Foundation, the Mary Flagler Cary Charitable Trust, the Fromm Foundation (Harvard University), and the Ernst and Young Emerging Composers Fund.

Richard Wernick is Professor Emeritus of the University of Pennsylvania. He received the 1977 Pulitzer Prize in music. From 1983 to 1989, he served as the Philadelphia Orchestra's Consultant for Contemporary Music, and from 1989 to 1993 served as Special Consultant to Music Director,

Riccardo Muti. He is the only two-time first prize Friedheim Award recipient, and has been honored by awards from the Ford Foundation, Guggenheim Foundation, National Institute of Arts and Letters, and the National Endowment for the Arts.

SUMMARY OF ARGUMENT

The experience of centuries of musical history testifies to one of the most unhappy realities of symphonic and concert music: a delay of acceptance and recognition, not to say remuneration, typically for decades. Our modern musical era has been no exception; most composers of symphonic and concert music today live in relative obscurity and economic need while creating their life's work, and only close to death or after death do they or their heirs start to reap acknowledgment and compensation for their works.

By extending copyright protection for new and existing works, the Sonny Bono Copyright Term Extension Act of 1998 ("*CTEA*"), Pub. L. No. 105-298, 112 Stat. 2827, provides composers of symphonic and concert music the increased assurance that, even accounting for longer lifespans and having children later in life, the musical legacy they leave behind will at least provide sustenance for their spouses, their children and their grandchildren.

The CTEA's extension of copyright protection for *existing* works also acts to promote the creation of *new* works of symphonic and concert music by emerging composers, because these creators rely on awards, grants, scholarships and fellowships for financial support. Countless such awards are funded by royalties collected for older, established works of symphonic and concert music. The CTEA ensures that such funding will continue for a reasonable time.

The CTEA further enriches the American musical heritage by affording the heirs of symphonic and concert composers and those who in invest in their works critical additional time

to promote and disseminate the composers' life work to the public—a promotion and dissemination which otherwise might not occur.

All of these facts were presented to Congress as it considered the CTEA. Congress measured the testimony and statements of numerous individuals and entities that emphasized the need to compensate creators of serious works of art (including works of symphonic and concert music), encourage the investment in and further dissemination of existing works, and promote the creation of new works. These facts, and the many others Congress considered, leave no doubt that the CTEA's extension of copyright protection to existing works does indeed "Promote the Progress of Science and useful Arts." *See* U.S. Const. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

ARGUMENT

I. RECOGNITION OF, AND REMUNERATION FOR, THE LIFE WORK AND LEGACY OF CREATORS OF SYMPHONIC AND CONCERT MUSIC IS USUALLY LONG-DELAYED

Professionals in the creative arts consistently struggle with the very real possibility that their life's work may never be recognized during their lifetimes. Artistic creators run this risk nonetheless, often sacrificing economic enrichment for themselves in hopes that their creations may someday provide for their heirs. This is particularly true for composers of symphonic and concert music. Centuries of history stand witness to their particular plight. Countless composers from the past, today considered the Great Masters of classical music, died in relative obscurity (and often times, poverty), and were not fully recognized in the repertoire until long after their deaths.

History is replete with examples of symphonic and concert musical works that were originally greeted with scathing criticism, yet later accepted as masterpieces. Consider the following concerning the derision which first greeted Stravinsky's *Rite of Spring*, and the forty years it took to recognize this masterpiece:

> A fairly accurate time-table could be drawn for the assimilation of unfamiliar music by the public and the critics. It takes approximately twenty years to make an artistic curiosity out of a modernistic monstrosity; and another twenty to elevate it to a masterpiece. . . . With what precision the law of a forty-year lag in the integral acceptance of a modern masterpiece operates, was demonstrated by the wild cheers that greeted Stravinsky at the performance of *Le Sacre du Printemps* in Paris on May 8, 1952, thirty-nine years after its première. Pierre Monteux, who conducted both performances, in 1913 and in 1952, remarked: "There was just as much noise the last time, but of a different tonality."

NICOLAS SLONIMSKY, LEXICON OF MUSICAL INVECTIVE: CRITICAL ASSAULTS ON COMPOSERS SINCE BEETHOVEN'S TIME 19 & n. (2d ed. 1978).

The American public is equally slow to recognize its major contributors to the repertoire of symphonic and concert music. An example is the life work of Charles Edward Ives (1874-1954), now considered one of America's greatest masters of symphonic and concert music, whose works were not taken seriously until a decade after his death:

> [Charles Ives'] [e]arly works include the precocious *Variations on "America"* for organ, written at seventeen; it would find considerable popularity after Ives died. . . . His epic *First Piano Sonata*, begun in 1901, was the first large-scale work in his radical vein, and cost him at least eight years of effort. It would not find its premiere until 1949. . . . [D]uring his years of obscurity Ives constantly showed his work to musicians,

> hired groups to play over pieces, revised the music based on what he heard, and had much of his music expertly copied. Yet, for twenty years the nearly unanimous reaction of musicians to his music was somewhere between laughter and outrage. It is no wonder that he required, as Aaron Copland put it, "the courage of a lion." . . . Charles Ives died in May 1954. . . . It was not until a decade later that the musical mainstream really began to take Ives seriously.

Jan Swafford, "Charles Ives: A Life With Music" (1998), *available at* http://www.charlesives.org/02bio.htm.

The delay in recognition of symphonic and concert composers' works continues to this day. That delay means not only a delay in compensation for the composer and his or her heirs, but also a delay in return to the music publisher who invests in such works and supports the composer for those long years. Edward P. Murphy of the National Music Publishers' Association echoed the observations of Pierre Monteux in his 1995 testimony before Congress, advocating passage of the CTEA:

> [M]uch serious music gains little public exposure or acceptance until many years after its creation. For example, the famous Barber composition, "Adagio for Strings," experienced only modest economic success following its debut in 1939. It became popular 25-years later, however, when the piece was used in connection with the funeral of President Kennedy. Another Barber work, an opera, "Anthony and Cleopatra," premiered in 1966, but was not performed or recorded again until 1991. This cycle of earnings which is typical of serious and classical works means that a composition, which may some day be recognized as an American classic may not return a profit to the creator's descendants or to the music publisher owner within the current term of copyright protection. . . .

Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248 and H.R. 1734

Before the House Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary, 104th Cong. (hereinafter "*1995 House Hearing*") 76-77 (1995).

A more recent example of this phenomenon is now world-renowned composer (and *amicus* on this brief) Philip Glass, whose work in the late 1970s and 1980s was greeted with "frantic bravos and violent boos, sometimes coming from the same people. Not since the days of the young Stravinsky had a music appeared that so engaged the emotions of the people who heard it. While many were hailing Glass as the man who had revitalized music and made opera a viable art form again, just as many were castigating him for 'destroying' music." Robert T. Jones, *Introduction*, *at* http://www.philipglass.com/.

George David Weiss, composer of "What a Wonderful World" and "The Lion Sleeps Tonight," testified before Congress regarding fair compensation to the artistic creators who enrich our culture. He noted that many composers—and not merely those who write "serious" music—do not achieve public recognition or financial reward until after their death:

> There are innumerable composers whose works never reach the pinnacle of public recognition until after their death. Herman Hupfeld ("As Time Goes By"), Vincent Youmans, and Charles Ives are just three examples. Whether it is because their music is *avant garde*—or out of synch with what is currently popular—such artists toil in obscurity for most of their creative days. And suddenly, after their death, public recognition and financial rewards abound. Too late for the creator, but in time to nourish their heirs - if the duration of protection is sufficient. What was lost to the creator should not be also lost to his or her heirs. . . . If we are to encourage creativity, at a minimum we must offer to the thousands of my colleagues who struggle to earn a living in this difficult and competitive business the reasonable prospect that they can leave a legacy to their children and grandchildren—even if their compositions do not become commercially viable for many years.

The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Comm. on the Judiciary, 104th Cong. (hereinafter "*1995 Senate Hearing*") 142-43 (1995).

II. THE CTEA RATIONALLY PROMOTES THE PROGRESS OF SCIENCE AND USEFUL ARTS BY ALLOWING FOR FAIR COMPENSATION AND ENCOURAGING CREATIVITY, INVESTMENT, PRESERVATION, PROMOTION AND DISSEMINATION IN FIELDS IN WHICH AN ARTIST'S WORK IS RECOGNIZED VERY LATE IN LIFE OR POSTHUMOUSLY

A. The CTEA Provides Fair Compensation for the Enrichment of American Culture through Symphonic and Concert Musical Works

Once accepted into the repertoire, works of symphonic and concert music enrich our culture and the lives of those who enjoy the music—the very essence of the constitutional goal of "promotion of progress" in our culture. Those who create such enrichment for the public good should be justly compensated with the assurance of an adequate copyright term.[2] For most symphonic and concert music composers, a

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[2] *See* S. REP. NO. 104-315, at 3 (1996) ("[The CTEA] will ensur[e] fair compensation for American creators, who deserve to benefit fairly from the exploitation of their works."); *id.* 11-12 ("[I]ntellectual Property is the only form of property whose ownership rights are limited to a period of years, after which the entire bundle of rights is given as a legacy to the public at large. In balancing these competing interests, Congress has sought to ensure that creators are afforded ample opportunity to exploit their works throughout the course of the works' marketable lives, thus maximizing the return on creative investment and strengthening incentives to creativity.").

copyright term sufficient in length *following* their death is the only means, albeit posthumous, of fair compensation for their life's work.

To provide creators of artistic works fair compensation for their contributions to American culture, the copyright term has historically been intended to cover the life of the author plus two generations. *See* H.R. REP. NO. 105-452, at 4 (1998). Due to increases in life expectancy and a delay in procreation until later in life, however, the copyright term provided by the 1976 Copyright Act fell short of this goal—approximately 20 years short. This was the inequity Congress was asked to, and did, remedy through the CTEA:

> Now certainly, there has been a minor increase in life expectancy in the United States since the duration provisions of the 1976 Act were proposed in the early 1960s, and enacted in 1976. . . . But the relation of life expectancy to copyright term should not be made by comparing the life-plus-50-years term and life expectancy in 1976 or 1964 with a life-plus-70-years term and life expectancy in 1990 or 1995. Rather, we must realize that life-plus-50-years was the international norm at the beginning of this century. Thus the increase in life expectancy over the 20th Century (from about 52 years in 1909-1911 to about 76 years now) should be reflected in an increase from the international life-plus-50-years norm at the beginning of the century to a life-plus-70-years term now. . . . [T]he life-plus term is also designed to protect the next two generations of the author's heirs. Extended copyright term is necessary to achieve adequate protection for the author's heirs, during the additional years they, too, are expected to live.

1995 Senate Hearing 134 (Joint Statement of the Coalition of Creators and Copyright Owners). Congress specifically recognized this fact when it enacted the CTEA. *See* S. REP. NO. 104-315 at 11 (1996) ("The Register of Copyrights informed the Committee that even for . . . works [that] are

afforded the basic life-plus-50 term of protection, the current term has proven insufficient in many cases to protect a single generation of heirs.") (citing Testimony of Marybeth Peters, Register of Copyrights and Associate Librarian of Congress for Copyright Services, *1995 Senate Hearing* 22).

Thus, the CTEA merely updated the copyright term to account for current life expectancy and child bearing patterns, ensuring that fair compensation for both existing and new works, especially to the heirs of composers of symphonic and concert music, would not fall short of two generations. *See 1995 Senate Hearing* 2 (Opening Statement Sen: Hatch) ("When we so often see copyrights expiring before even the first generation of an author's heirs have fully benefited from them, then I believe it is accurate to say that our term of copyright is too short.").

B. The CTEA Promotes American Culture by Extending Copyright for Existing Symphonic and Concert Music

Congress specifically recognized that the CTEA promoted progress in culture in two ways: First, by providing an incentive for the creation of new works; and second, by extending protection for existing works which then supports further creativity, investment and dissemination.

> [T]he basic functions of copyright protection are best served by the accrual of the benefits of increased commercial life to the creator for two reasons. First, the promise of additional income will increase existing incentives to create new and derivative works. *The fact that the promise of additional income is not realized for many years down the road does not diminish this increased creative incentive. One of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and*

> *grandchildren. . . . Second, extended protection for existing works will provide added income with which to subsidize the creation of new works.*

S. REP. NO. 104-315 at 12 (1996) (emphasis added).

1. *The CTEA Ensures a Proper Legacy to the Composer's Heirs*

Beyond fair and just compensation for themselves (which too often is illusory), the expectation that the copyright term will provide a potential legacy for their children and grandchildren gives symphonic and concert composers a significant incentive to create. The CTEA's extension of copyright term for existing works further bolsters this incentive, assuring symphonic and concert composers that the creative legacy they leave may someday benefit their heirs. E. Randol Schoenberg (grandson of Austrian-American composer Arnold Schoenberg[3]) testified from personal experience about the importance of a fair post-mortem copyright term to serious music composers:

> My grandfather, the world-renowned Austrian-American composer, Arnold Schoenberg, came to this country in 1933 after being forced by the Nazis to abandon his

[3] Arnold Schoenberg is one of the composers, now recognized as a master of the classical music genre, who was subject to vituperative criticism when his works debuted. One of many critics said at the time of a now highly-regarded work:

> I must reject completely the five orchestral pieces of 1909. . . . These sounds conjure up hideous visions; monstrous apparitions threaten—there is nothing of joy and light, nothing that makes life worth living! How miserable would our descendants be, if this joyless gloomy Schoenberg would ever become the mode of expression of their time! Is this destined to be the art of the future????

NICOLAS SLONIMSKY, LEXICON OF MUSICAL INVECTIVE: CRITICAL ASSAULTS ON COMPOSERS SINCE BEETHOVEN'S TIME 150 (2d ed. 1978) (quoting Hugo Leichtentritt, *Signale*, Berlin, Feb. 7, 1912).

> position as the leading composition teacher at the Academy of Arts in Berlin, Germany. . . . He is generally considered to be the most important and influential composer of the twentieth century, and is called by some the "father of modern music.". . . Despite his importance in the field of music, my grandfather died in 1951 with few assets aside from his artistic works. He left behind my grandmother and three young children (ages 10, 14 and 19) who survived primarily on copyright royalties. . . . For my grandfather, as with most serious composers today, the prospect of performances and recognition after his death was his only hope of compensation and support for his young family. Had he not had faith in the ability of his copyrights to support his family, he would not have been able to devote the time that his groundbreaking work required. Certainly, [the CTEA] will be a further inspiration to those artists creating today, whose works are also not likely to receive their due during their lifetime.

1995 *House Hearing* 265 (Statement of E. Randol Schoenberg).

2. *Royalties from Existing Works Support Emerging Composers and Their New Works*

Not all royalties from existing works stay within the composer's family.[4] Many composers donate or bequeath the royalties from their works to benefit others in their field, especially those just starting out. Consequently, the extension of the copyright term for existing works promotes the creation of new symphonic and concert musical works by providing composers breaking into the field with the financial support needed to persevere in a discipline known for its

[4] A notable example of an accomplished composer whose royalties benefit others is Irving Berlin, who donated the royalties from *God Bless America* to a charitable trust, which conveys them to the Girl and Boy Scouts of America. *See American Treasures of the Library of Congress, God Bless America, at* http://www.loc.gov/exhibits/treasures/trm019.html.

unforgiving remunerative nature. Without aid from outside sources, many who would otherwise devote themselves to composing new works would turn away from their creative work so as to provide for themselves and their families, contravening the economic purpose of the Copyright Clause:

> If [Charles Ives] had continued on the career path of an organist/choirmaster/composer/teacher like Horatio Parker, Ives would have gone from Yale to complete his studies in a European, probably German, conservatory. Instead, he took a path that led him into one of the most difficult and unconventional lifestyles of any major composer: acting on some of his father's last words of advice, Ives decided to forego a musical career and go into business. When he left Yale in 1898, he headed for New York to begin as a $15-a-week clerk with the Mutual Life Insurance Company. . . . As Ives put it, if a composer "has a nice wife and some nice children, how can he let them starve on his dissonances?"

Jan Swafford, "Charles Ives: A Life With Music" (1998), *available at* http://www.charlesives.org/02bio.htm.

This all-too-familiar economic and professional dilemma has led to the creation of foundations, awards, grants and fellowships—all funded, in full or in part, by the royalties from existing works—which support emerging composers of symphonic and concert music. The ASCAP Foundation, for example, reinvests donated royalties from existing works and other charitable contributions to fund awards, grants, scholarships and fellowships to emerging composers of symphonic and concert music. Among the ASCAP Foundation's awards, grants, fellowships and composer-in-residence programs providing resources for emerging composers are: The Morton Gould Young Composers Award, The Leo Kaplan Award, The New Horizons Award, The Sammy Cahn Award, The Rudolf Nissim Prize, The Young Jazz Composer Awards, The R&B Music Initiative, The Leonard Bernstein Composers Fund, The Leonard Bernstein Composer Fellowship at

Tanglewood, The Fellowship for Film Scoring & Composition at Aspen, The New York University Film Studies Fellowship in Florence, Italy, The ASCAP Foundation Commissioning Program, The Berklee College of Music Composer-in-Residence, The New York Philharmonic Education Program, The Metropolitan Opera Composer-in-Residence and The New York City Opera Composer-in-Residence. The ASCAP Foundation also awards numerous scholarships and grants to support musical composition students and musical education in various schools and summer camps and in fellowships and composer-in-residence programs. The ASCAP Foundation provides hundreds of thousands of dollars annually to emerging musical artists. *See ASCAP Concert Music: Programs Administered by ASCAP's Concert Music Department, at* http://www.ascap.com/concert/programs.html.[5] None of these programs would have been possible without the donation of royalties earned by existing works.

There are also many examples of individual composers who have bequeathed their royalties from existing works to support emerging artists. Aaron Copland, for instance, left virtually all of his estate to The Aaron Copland Fund for Music, Inc., which operates grant programs to encourage and improve public knowledge of contemporary American concert music and jazz. Since 1992, the Copland Fund has awarded more than $9 million to encourage and improve support for the recording, performance and other dissem-

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[5] The ASCAP Foundation is not alone in its assistance to musical composers. Other foundations reinvest royalties from existing works to aid emerging musical artists. For instance, the Kurt Weill Foundation for Music is funded entirely by royalties earned from the musical works of Kurt Weill and related literary and other rights, and uses such royalties to fund numerous activities that provide creative opportunities for new artists, including grants and awards such as the "Award for New Musical Theater" to encourage composers of new musical theater works. *See Kurt Weill Foundation for Music, at* www.kwf.org.

ination of American music, both in the United States and around the world. *See The American Music Center, AMC Grant Programs, The Aaron Copland Fund for Music Performing Ensembles Program Guidelines, at* http://www.amc.net/resources/grants/performing.html. Virgil Thomson also left the entire proceeds of his estate to the Virgil Thomson Foundation to provide assistance to concert music projects, particularly those involving contemporary American concert music. Charles Kingsford, Frank Proto and Irwin Bazelon left their estates to the ASCAP Foundation for the purpose of encouraging and assisting the efforts of emerging composers. *See The ASCAP Foundation: Where Music Grows, The ASCAP Foundation Timeline, at* http://www.ascapfoundation.org/timeline2.html (Charles Kingsford as major supporter). Dizzy Gillespie left his estate to a fund that reimburses the medical expenses of indigent jazz musicians. *See Englewood Hospital and Medical Center, at* http://www.englewoodhospital.com/Pages/dizzyGCI.html.

3. *Royalties from Existing Works Encourage Composers' Heirs and Others to Invest in, Promote and Disseminate Their Works*

Modern digital recording technology has made possible the permanent preservation of the American musical legacy. That, in turn, allows for increased investment in the dissemination of that legacy. In the case of symphonic and concert music, the heirs of composers, and their music publishers, most often take on the responsibility of preserving, promoting and disseminating the musical repertoire that was left behind. The CTEA provides these heirs (and investors) with the crucial incentive of an additional 20 years to take advantage of the gifts of the digital revolution in investing in and promoting their parents' or grandparents' creations. E. Randol Schoenberg testified:

> Today, our family continues to spend a great deal of time and energy promoting my grandfather's works and protecting his cultural legacy which is a treasured asset of the City of Los Angeles. My generation, the grandchildren, span from age 17 to 35. It would be a great loss if our family were not now able to reap the benefits of my grandfather's life's work, just as those benefits are coming to fruition. In serious music, even 70 years after death is sometimes insufficient. J.S. Bach's music had to wait almost 100 years after the composer's death before Felix Mendelsson "discovered" it and proclaimed its greatness to the world.

1995 Senate Hearing 65 (Statement of E. Randol Schoenberg).[6] The CTEA provides composers' heirs and others with an additional 20 years to invest in and promote works of American culture.

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[6] *See also 1995 Senate Hearing* at 58 (Statement of Mrs. Henry Mancini) ("My husband always intended that his work would be a legacy for his children. Indeed our children are actively involved in the business aspects of my husband's catalogue and insuring that his works continue to be available to the public."); *id.* at 60 (Statement of Ellen Donaldson, daughter of Walter Donaldson) ("My point is: [My father's works are] [s]till used, still there. After all these years. Not lost somewhere in 'cyberspace'. It is a small piece of the jigsaw puzzle of distinctly American intellectual property that helps define our national culture. It has been protected and promoted and always available. It has been a benefit to my mother, my sister and to me, as my father's direct heirs. . . ."); *id.* at 63 (Statement of Marsha Durham, daughter of African/Indian American composer, Eddie Durham) ("[A]fter many years of arduous research I am finally in the process of recapturing the rights to [my father's] songs for the final 19 years of copyright protection available under the 1976 Copyright Act. I am hopeful that through careful management of my father's catalogue, my brothers, sister and I will be able to recoup our legal expenses and to derive some revenues from our father's songs. The irony is, of course that absent an extension of the term of copyright, we will have only a few short years of income from the songs which should rightfully have been a source of income for my father, his children and his grandchildren for many years.").

As Congress considered the CTEA, it understood that one of the rationales behind the creation of the life-plus-50 term in the 1976 Act was that the technology at that time had increased the value of copyrighted works, especially serious works of art:

> Indeed early in the discussions of the first Copyright Office report on revision, term extension was advocated because new media made older works more exploitable. . . . It was repeatedly noted that the value of serious works was often not fully recognized until well into the copyright term . . . . 122 Cong. Rec. 3834 (1976) (statement of Sen. Hugh Scott; "[a] short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years," referring to works of F. Scott Fitzgerald, Theodore Dreiser and Sinclair Lewis).

1995 Senate Hearing 135 (Joint Statement of the Coalition of Creators and Copyright Owners). The digital and Internet revolutions provide the same, if not more imperative, grounds for the CTEA's 20-year extension to protect existing works.

CONCLUSION

Half a century ago, this Court recognized—as did Madison in *The Federalist Papers*—that proper economic remuneration to creators was not only fully consonant with, but also essential to, the public good:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Mazer v. Stein, 347 U.S. 201, 219 (1954).[7] More so than in any other artistic endeavor, the creation of symphonic and concert music requires "sacrificial days." It is only right and just—to say nothing of reasonable—that Congress recognized that copyright term extension for new and existing works was necessary to compensate the composer and two generations of heirs, and to provide for investment in, and preservation, promotion and dissemination of, existing works. For these rational reasons, and a host of others, Congress enacted the CTEA, and so provided the necessary protection and incentives for the promotion of progress of serious American works of art, among them, works of symphonic and concert music.

The decision below should be affirmed.

Respectfully submitted,

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[7] "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals." THE FEDERALIST NO. 43 (James Madison).

(42)

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

—v.—

JOHN D. ASHCROFT, in His Official Capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS, AMBERSON HOLDINGS LLC, RICHARD AVEDON, THE GEORGE BALANCHINE TRUST, PETER BARTOK, BOOSEY & HAWKES, INC., THE AARON COPLAND FUND FOR MUSIC, INC., EUROPEAN-AMERICAN MUSIC CORPORATION, THE GEORGE GERSHWIN FAMILY TRUST, THE LEONORE S. GERSHWIN TRUST FOR THE BENEFIT OF THE IRA AND LEONORE GERSHWIN PHILANTHROPIC FUND, THE LEONORE S. GERSHWIN TRUST FOR THE BENEFIT OF THE LIBRARY OF CONGRESS, THE KEITH HARING FOUNDATION, THE FREDERICK LOEWE FOUNDATION, INC., DAVID MAMET, GLEN ROVEN, AND THE KURT WEILL FOUNDATION FOR MUSIC IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

This brief supporting Respondent is submitted in opposition to the misplaced efforts of Petitioners and their *amici* to obtain from the Court what they could not obtain from Congress. Consents to this filing are lodged with the Clerk.

Amici are the nation's trade associations of book publishers, the Association of American Publishers ("AAP"), and the composers, artists, and playwrights (or their heirs) of some of the most celebrated and prized works of 20th Century culture, who are identified more fully in the Addendum below. They all depend on the rights secured by copyright law to engage, in their various ways, in the creation and/or dissemination of copyrighted works, to the larger public benefit.[1]

Not all *amici* supported the enactment of the Copyright Term Extension Act ("CTEA"). AAP, for example, took no position due to the different positions that its members, the nation's leading publishers, had on the legislation, some supporting and some opposing, depending on the nature of their businesses. But all *amici* believe it important that Congress be allowed to weigh the competing concerns and make the policy judgments that the Copyright power authorizes, and that Petitioners' effort to have the courts displace the congressional judgment will in the long run be destructive of the Constitutional plan and congressional exercise of its powers. Congress, not the Courts, is entrusted with that responsibility and armed with the ability to balance interests and make fine distinctions that is the essence of the legislative, not the judicial, process.

When Petitioners and their *amici* first articulated to Congress the arguments now made again here, Congress considered them and altered the legislation accordingly. One result of that process is 17 U.S.C. § 108(h), which responded

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[1] No counsel for a party in this Court authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of the brief. *Amici* are identified in an addendum attached hereto.

to concerns of some libraries – which continue to challenge the CTEA even though their concerns were addressed – by providing for use of works during the entire extension period after reasonable investigation.

Amici fully support the importance of close First Amendment review when First Amendment rights are threatened. But neither the CTEA nor copyright law generally threatens those rights. Generally supportive of the holding of the D.C. Circuit and the argument of the Solicitor General as to the power of Congress to have enacted the CTEA, we focus here on Petitioners' First Amendment argument, showing that it is inconsistent with the traditional understanding of the reconciliation of copyright and free speech doctrines and with the history underlying the Copyright Clause and early copyright jurisprudence in both Great Britain and the United States, and on the threat that Petitioners' arguments pose to prior extensions and corresponding reliance interests.

SUMMARY OF ARGUMENT

Petitioners' argument that the CTEA violates the First Amendment ignores the First Amendment safeguards already internalized in copyright law, and fails to explain why internal protection previously considered adequate to protect First Amendment rights is now insufficient. There is no authority in this Court for subjecting copyright statutes to free-standing First Amendment review, much less to intermediate scrutiny, and considerable precedent arguing against the intermediate review Petitioners seek to import. First Amendment freedoms are essential, but the accommodation between copyright law and the First Amendment is already in place, internal to copyright law, and, at least for traditional copyright statutes like the CTEA, an additional layer of First Amendment intermediate scrutiny is both unnecessary and unworkable.

Nor is history on Petitioners' side. The Framers perceived no conflict between the Copyright Clause and the First Amendment, nor did they consider extending copyrights in existing works unconstitutional. Petitioners further

misrepresent the grounds of the Framers' concern with "monopolies," which was more the product of fears of favoritism than the result of a desire to limit exclusive rights.

Petitioners offer no principled distinction between the CTEA and previous congressional extensions of the term or scope of copyright, and to accept their attack on the CTEA would place the prior extensions in doubt and unsettle countless investments and transactions entered in reliance on prior extensions.

ARGUMENT

I. THE CTEA DOES NOT VIOLATE THE FIRST AMENDMENT

A. Copyright Itself Is The Engine Of Free Expression And Provides The Necessary Breathing Room For Free Speech.

Petitioners' argument rests on the erroneous premise that copyright suppresses free speech.

The primary concern of the First Amendment is the free flow of *ideas*.[2] But "[c]opyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed."[3]

This so-called "idea-expression dichotomy" – the rule that copyright does not restrain the exchange of an author's ideas, but merely prevents others from purloining an author's particular *expression* of those ideas – "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556. The idea-expression dichotomy nurtures and protects

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[2] *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (rationalizing freedom of speech as a means of "preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail").

[3] *Harper & Row, Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 556 (1985), citing Justice Brennan's concurrence in *New York Times Co. v. United States*, 403 U.S. 713, 726 n. * (1971); *see also* 17 U.S.C. § 102(b); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991); *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

the "marketplace of ideas." On the one hand, the dichotomy allows others to make use of, build upon and disseminate ideas that have already been conceived; ideas are free for all to use, and completely outside copyright protection. "The marketplace of ideas would be utterly bereft, and the democratic dialogue largely stifled, if the only ideas which might be discussed were those original with the speakers."[4] On the other hand, the dichotomy also serves to foster the creation and dissemination of new ideas, by securing income streams to creators for their particular expressions for limited periods. "It should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[5]

The free flow of ideas is vital to our democratic society for three reasons. It educates and informs (the "enlightenment function").[6] It acts as "a safety valve against violent acts."[7] And it serves as a means of "self-fulfillment," or "an end in itself."[8] Granting a monopoly, let alone a monopoly for limited times, on the particular expression of an idea does no harm to any of these purposes.

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4 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH ["SMOLLA"] § 21:5, at 21-8.2 (1996) (citing *Lee v. Runge*, 404 U.S. 887, 893 (Douglas J., dissenting)) ("The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained.").

5 *Harper & Row*, 471 U.S. at 558.

6 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT [hereinafter "NIMMER"] § 1.10[1] (2002) (citing, *inter alia, Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J. concurring)).

7 *Id. See also* Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression* [hereinafter, "Denicola"], 67 CAL. L. REV. 283, 286 (1979) (free speech "can act as a stabilizing force in society in that it channels potentially disruptive energy into a more useful public dialogue. . . .") (also citing Brandeis' concurrence in *Whitney*).

8 NIMMER, *supra*, § 1.10[1]; Denicola, *supra*, at 286.

Any argument that extending copyright terms for expression (not ideas) frustrates either the "safety valve" or the "self-fulfillment" purpose of free speech can be quickly rejected. "It is not likely that men will resort to violence because they lack the legal right to reproduce the expression of another"[9] and "[o]ne who pirates the expression of another is not thereby engaging in *self*-expression in any meaningful sense."[10] As Professor Jane Ginsburg has written:

> [Petitioners'] would like to avoid the rational basis test, to put the [term] extension to a higher standard. . . . [Petitioners' argument is that the] term extension has a deleterious impact on speech; and once one pronounces the word 'speech,' a higher level of scrutiny attaches. But where is the 'speech' at issue here? What Eric Eldred proposes to do is recirculate *other people's* speech. The First Amendment is certainly about the freedom to make your *own* speech. Whether it is about the freedom to make other people's speeches again for them, I have some doubt.[11]

The most vital of the three functions – the "enlightenment function" – is also not harmed by the grant of a limited copyright monopoly, regardless of the term of years. "It is exposure to ideas, and not to their particular expression, that is vital if self-governing people are to make informed decisions."[12] Professors Smolla and Nimmer offer this example:

> It is important that we have free access to the ideas of both William F. Buckley and John K. Galbraith; and everyone should have the right

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9 SMOLLA, *supra*, § 21:5, at 21-11.

10 *Id.*

11 Jane C. Ginsburg, et al., *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 701 (2000) (emphasis added).

12 SMOLLA, *supra*, § 21:5, at 21-10.

> to disseminate Buckley's and Galbraith's ideas, either by way of endorsement or criticism. That process of enlightenment, however, does not require the freedom to reproduce without permission either Buckley's book *Up From Liberalism* or Galbraith's *The Affluent Society*. To reproduce the 'expression' of their ideas may add flavor but relatively little substance to the data that must inform the electorate in the decision-making process. Such minimal substance, lost through the copyright prohibition on reproduction of expression, is far outbalanced by the public benefit that accrues through copyright encouragement of creativity."[13]

Courts have consistently protected copyrighted expression from challenges that cite a First Amendment "need" or "right" to use such expression. The most famous of these is *Harper & Row*, where the Court rejected The Nation's argument that it had a First Amendment right to copy the expression of former President Ford contained in his then unpublished memoirs. Responding to the claim that Ford's expression was "essential to reporting the news story," the Court held:

> Copyright assures to those who write and publish factual narratives . . . that they may at least enjoy the right to market the original *expression* contained therein as just compensation for their investment. . . . In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create

[13] *Id.* § 21:5, at 21-10 – 21-11.

> what amounts to a public figure exception to copyright.[14]

The Court's rejection of the First Amendment challenge in *Harper & Row* mirrored and relied on its approach eight years earlier in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).[15] Zacchini had brought a damages action against a television broadcasting company that videotaped and broadcast his "human cannonball" act in its entirety, without consent. The Court held that a damage award for infringement of Zacchini's property interest in the publicity value of his performance did not violate the broadcaster's First Amendment rights, because protecting that property interest would not seriously curtail public access to or discussion of Zacchini's performance. Indeed, the Court noted that protecting his interest would encourage Zacchini to continue to perform the act, and thereby serve the public interest.[16] Finding satisfactory "the internal limits of the right of publicity"[17] and observing that granting Zacchini a monopoly on the performance (in the form of a right of publicity) would not prevent the defendant from reporting the facts surrounding Zacchini's act, the Court rejected the First Amendment defense.[18]

Dispositively, although First Amendment claims were raised in both *Zacchini* and *Harper & Row*, the Court applied "intermediate scrutiny" in neither, but rather rejected the First Amendment challenges on a categorical basis after concluding that neither infringement claims nor right of publicity claims threaten the traffic in *ideas*.

[14] 471 U.S. at 556-60 (emphasis added).

[15] *See* 471 U.S. at 557, citing 433 U.S. at 575.

[16] 433 U.S. at 573. Thus, the Court viewed the property interest in the act, like a copyright interest, as an engine of free expression. *See id.* ("[T]he State's interest [in recognizing a right of publicity] is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors. . . .").

[17] Denicola, *supra*, at 288.

[18] 433 U.S. at 574.

In sum, the idea-expression dichotomy, in copyright and related cases, appropriately accommodates free speech concerns.[19] And for any cases where "the values inherent in the rights of free speech and free press demand more than access to abstract ideas" and require "the use of the particular form of expression contained in a copyrighted work,"[20] copyright law, constructed to avoid any collision with the First Amendment, offers additional internal protections to protect free speech without the application of intermediate scrutiny.

First, under the "substantial similarity test," a speaker's use of a minimal amount of expression will generally not be actionable absent "substantial similarity" between the new work and the original work.

Second, where the information sought to be communicated and the mode of its expression are so intertwined that the one cannot be conveyed without the other, the expression is considered "merged" with the uncopyrightable idea.[21]

Third, and most importantly, the fair use doctrine also guarantees "breathing space *within the confines of* copyright [law]." *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (emphasis added). As *Harper & Row* recognized, the doctrine of fair use serves as an additional, broadly applicable

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[19] Other courts have reached the same conclusion. *See, e.g., Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir.) ("To deny a biographer . . . the opportunity to copy the expressive content of unpublished letters is not . . . to interfere in any significant way with the process of enhancing public knowledge of history or contemporary events. The facts may be reported."), *cert. denied*, 484 U.S. 890 (1987); *New Era Publ'ns, Int'l ApS v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) ("An author's expression of an idea, as distinguished from the idea itself, is not considered subject to the public's 'right to know.'"), *cert. denied*, 493 U.S. 1094 (1990); *Sid & Marty Krofft Tel. Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (same); *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 795 (9th Cir. 1992) (same).

[20] Denicola, *supra*, at 293.

[21] *See e.g., Baker v. Selden*, 101 U.S. 99 (1879); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

safeguard against any interference of copyright law with constitutionally protected speech.[22] The doctrine of fair use, codified in Section 107 of the Copyright Act, "tempers the protection of copyright by allowing an author to use a limited amount of copyrighted material"[23] when copyright law might otherwise "stifle the very creativity which that law is designed to foster."[24]

Petitioners' attempts to distinguish *Harper & Row* and its progeny rely on wishful thinking, not persuasive analysis. If, as Petitioners all but concede, *Harper & Row* establishes "a presumption against the need to engage in a First Amendment analysis every time a copyright owner seeks to enforce his copyright against an infringer," then that same presumption should apply when the challenge is to the CTEA on its face (rather than to the 1976 Act "as applied"). Petitioners offer no principled reason why intermediate scrutiny is unnecessary for as-applied challenges (as this Court and every Circuit court that has addressed the issue has held), but necessary for facial challenges.

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[22] *Harper & Row*, 471 U.S. at 560 ("In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright."). Circuit court rulings are in accord. *See, e.g., Roy Exp. Co. Establishment v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1099 (2d Cir.) ("[n]o Circuit that has considered the question . . . has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine"), *cert. denied*, 459 U.S. 826 (1982); *New Era Publ'ns, Int'l*, 873 F.2d at 584 ("the fair use doctrine encompasses all claims of first amendment in the copyright field"); *A& M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) ("First Amendment concerns in copyright are allayed by the presence of the fair use doctrine.").

[23] *Twin Peaks Prods. v. Publications Int'l*, 996 F.2d 1366, 1373 (2d Cir. 1993).

[24] *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

B. Intermediate Review Is Not Applicable Because Copyright Is A Law Of General Application That Does Not Restrict The Transmission Of Ideas.

Because copyright law *internally* provides the necessary breathing room for free speech, *see Harper & Row* and *Campbell*, "the present reach of the copyright law is such that its full scope should be 'defined' as outside the First Amendment sphere."[25] That is the approach the Court has taken, as *Harper & Row* and *Zacchini* reflect. And because facial challenges to statutes ordinarily draw no different standard of First Amendment review from "as-applied" challenges, the refusal to apply intermediate scrutiny in those cases should be controlling.

The Court's refusal to apply intermediate scrutiny in *Harper & Row* and *Zacchini* flowed directly from its view of copyright law as "the engine of free expression" rather than its enemy, and was consistent as well with various other lines of cases in which intermediate (or stricter) scrutiny has not been, but under Petitioners' theory should have been, applied.

"Intermediate" and "strict" scrutiny are not all-purpose tests applicable to every claim that a statute has, either intentionally, predictably or incidentally infringed First Amendment rights. Sui generis approaches (rather than "strict" or "intermediate" scrutiny) have been applied, not only in copyright and right of publicity cases such as *Harper & Row* and *Zacchini*, but also in funding cases,[26] defamation cases,[27] and cases involving the competing rights of cable access programmers and cable operators.[28] Members of the Court have frequently observed that different tools are

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[25] SMOLLA, *supra*, at 21-5.

[26] *South Dakota v. Dole*, 483 U.S. 203,207-210 (1987); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Legal Servs. Corp. v. Velazquez*,, 531 U.S. 533 (2001).

[27] *E.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

[28] *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 739-42 (1996).

required in cases where competing First Amendment interests are at stake.[29] The considerations that underlay the formulation of situation-specific tools, sensitive to the competing interests in all those situations, in lieu of the residual "strict" and "intermediate" scrutiny tools applied elsewhere, support the categorical approach adopted in *Harper & Row*.

Rejection of Petitioners' invitation to apply intermediate scrutiny is supported as well by the Court's refusal to apply such scrutiny to regulations that govern non-expressive *conduct* and do not impose meaningful burdens on speech. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Copyright statutes, like the state promissory estoppel doctrine at issue in *Cohen* or the public lewdness law applied in *Arcara*, are generally applicable laws that do not target or single out the press and/or speech itself and apply to myriad "daily transactions" of Americans generally. *Cohen*, 501 U.S. at 670. Indeed, in refusing to apply intermediate scrutiny, *Cohen* reasoned that the "press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws," and concluded that "enforcement of such general laws . . . is not subject to stricter scrutiny." 501 U.S. at 669-70.

We all are subject to copyright laws; we all have a duty not to infringe established intellectual property rights through such unlawful conduct as copying, misappropriation, public displays, and the production of derivative works. So long as these laws are not used to punish or prevent the expression of ideas or opinions, only rationality review need be applied.

Petitioners ask this Court to apply the heightened level of intermediate scrutiny of *Turner Broadcasting System, Inc. v. FCC*.[30] However, the reasons for applying intermediate scrutiny in that case ("*Turner I*") do not exist in the copyright context. The CTEA does not, as the 1992 Cable Act did, require some speakers to carry the message of others

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[29] *Id.* at 743-44 (Breyer, J., concurring).

[30] 512 U.S. 622 (1994) ("*Turner I*").

(broadcast stations) at the expense of still others (cable programmers), thereby "impos[ing] special obligations upon cable operators and special burdens upon cable programmers."[31] Neither the CTEA nor copyright law generally "single[s] out the press, or certain elements thereof [cable programmers] for special treatment," thus "pos[ing] a particular danger of abuse by the State."[32]

Copyright stimulates the creation of new, original speech; whether for a term of one year or ninety years, it does not even arguably require some speakers to carry the message of others. Unlike FCC regulations which apply to discrete and identifiable parties like cable-network stations, copyright is a generally applicable law reaching everyone who copies. Whether for a term of life plus fifty years or life plus seventy, copyright imposes no special burdens or obligations on the press or on anyone else. The press, along with every other institution and every individual, is equally free to use the ideas embodied in a copyrighted work of authorship, and equally constrained to refrain from appropriating protected expression during the term Congress has set. If a term of fifty years does not offend the First Amendment, it is hard to see why the CTEA's terms do.

C. Intermediate Scrutiny Would Be Entirely Unworkable In The Copyright Sphere.

Intermediate scrutiny of the sort applied in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"), is inconsistent with the analysis in *Harper & Row*, and far too blunt a tool to be workable as applied to the CTEA or to copyright law generally; indeed, if rigorously applied, numerous provisions of copyright law might be found wanting. The point is not that copyright law is violative of the First Amendment – it surely is not – but that the test Petitioners would have the courts apply leads to such absurd results as to confirm that it must be rejected.

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31 *Id.* at 641.

32 *Id.* at 640.

First, the very premise underlying *Harper & Row* was that copyright law burdens only the copying of expression and not the communication of ideas or free speech. But intermediate scrutiny of the sort required by *Turner I* is called for only if the statute challenged does burden speech.[33] The invitation to apply *Turner I* is at war with *Harper & Row*.

Second, it is hard to see how *Turner* analysis can be applied in a principled, predictable way that would not lead to the invalidation (at least by lower courts) of numerous provisions of copyright law. In *Turner II*, it was easy for the Court to articulate the relevant interests on both sides and to evaluate Congressional findings based on statistics, audience behavior, economic principles and broadcast history. However, copyright terms like "progress of science and the useful arts" and "limited times" resist meaningful *Turner* review.

Evaluating more or less restrictive means would be judicially unmanageable. Congress has for centuries applied copyright to *all* writings; how would a court assess whether that scope of coverage "burdens substantially more speech than is necessary" to further "the progress of science and the useful arts"? Or whether any challenged provision of copyright law (whether durational terms like the CTEA, extensions of copyright like the Digital Performance Right in Sound Recordings Act of 1995, or the extension of copyright to photographs "burdens substantially more speech than necessary to further" Congress's legitimate objectives? Must Congress have compiled a record with "evidence" supporting those judgments, and myriad others, for courts to pass on, even though neither the first Congress nor later Congresses enacting extensions did so?

Copyright law is built on Congress's understanding of both economic principles and the psychology of innovation, and has rested since the Statute of Anne on legislative judgments regarding incentives and public needs. To subject those legislative determinations to the inquiries reflected in

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33 *See* Point I.B., *infra* at 10-12.

Turner II would work a revolution in the ways that Congress approaches copyright revision, and unreasonably interfere with the legislature's exercise of its Article I, § 8 power.

Unlike cable television in the 1990s (still a relatively novel form of communication), copyright laws have existed in relatively the same basic form since the 1790s, and substantial reliance interests have arisen (discussed more fully in Point III below). Although cable television's youth permitted judicial fine-tuning without much fear of destabilization, introducing intermediate scrutiny to copyright now would threaten the entire system, unsettle established expectations, and risk creating substantial economic instability.

As in cases involving Congress's enumerated Article I powers generally, the Court should uphold copyright laws so long as the limitations of Article I are respected, Congress is pursuing a legitimate governmental objective, and the means chosen are rationally related to that objective. The Framers crafted the "limited times" provision in the Copyright Clause to give future Congresses appropriate authority in meeting the experiential demands of passing generations. So long as Congress does not pass laws prohibited under its enumerated powers, for the Court "to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[34] Simply stated, "limited times" is a question of degree. Applying rationality review would categorically rule out perpetual copyrights and would rationally rule out thousand year terms, but leave Congress with the necessary flexibility to make the necessary assessments, through the political process, concerning demographics, international markets and artistic capital. [35]

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[34] *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819).

[35] *See Pennock & Sellers v. Dialogue*, 27 U.S. 1 (1829) (duration is subject to the discretion of Congress, although Congress may not, under Article I, Section 8, confer intellectual property rights of unlimited duration).

II. History Does Not Support Petitioners' Argument That Copyright Term Extension Is Unconstitutional Or Warrants Close Review Under The First Amendment

A. The Framers Perceived No Tension Between The Copyright Clause And The First Amendment.

The Framers perceived no conflict between the Copyright Clause and the First Amendment. The Copyright Clause was not controversial; it was one of few clauses that the Constitutional Convention adopted without debate.[36] Two years later, when James Madison introduced the Speech Clause of the First Amendment in the House of Representatives, no member of Congress argued that the First Amendment was in tension with the Copyright Clause's protections of intellectual property.[37] The Framers entrenched the people's "right to speak, to write, [and] to publish their sentiments," but did not conceive of free speech as impinging upon proprietary or other rights (or vice versa).[38] Madison himself, as a member of the first Congress, voted for the Copyright Act.

Nor did any conflict between the two clauses manifest itself for many years after the adoption of the First Amendment. For example, nowhere in his landmark 1833 *Commentaries on the Constitution of the United States* did Justice Joseph Story perceive any incompatibility between copyright and free speech. Copyright's role in preventing "depredation and piracy" fell neatly outside the recognized limits to speech rights in the First Amendment: "[T]he language of this amendment imports no more, than that every man shall have a right to *speak, write, and print his opinions* upon any subject whatsoever, without any prior restraint, so always, that he does *not injure* any other persons in his rights,

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[36] 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 510-11 (J. Elliot ed. 1859).

[37] *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 44 (Boston, Hilliard, Gray & Co. 1833).

[38] 1 ANNALS OF CONG. 451 (1789) (proposal by Madison).

person, *property*, or reputation."[39] While "every freeman has an undoubted right to lay what sentiments he pleases before the public," Story observed, he must, "if he publishes what is improper, mischievous, or illegal," accept "the consequences of his own temerity."[40]

B. The Framers Did Not Consider Extensions Of Copyrights To Existing Works To Be Unconstitutional.

The history of copyright in the early years of the Republic also confirms that the Framers did not doubt the constitutionality of extending copyrights in existing works. Indeed, Congress made such "retroactive" extensions of intellectual property rights thirteen times in its first sixty-three years, including in the Copyright Act passed by the First Congress in 1790.

Extensions of copyright to existing works were a regular feature of copyright legislation throughout the eighteenth century. The Statute of Anne, which, like the Copyright Clause, declared its purpose to be for "the encouragement of learning," extended copyright protection of twenty-one years from the date of publication to works published prior to its enactment, while subsequently published works received copyright terms of fourteen years, plus an additional fourteen-year term if the author survived the original term.[41] Under the Articles of Confederation, several states adopted copyright statutes that similarly extended protection to existing works. For example, Madison introduced legislation in the Virginia House of Delegates in 1785 that granted authors copyrights of twenty-one years in books or pamphlets "already printed."[42] Massachusetts, New Hampshire, Rhode Island, and South

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[39] 3 STORY, *supra*, § 1874.

[40] *Id.* § 1878.

[41] 8 Anne, ch. 19 (1710) (Eng.).

[42] Act of Nov. 16, 1785, *reprinted in* 8 PAPERS OF JAMES MADISON 418-19 (William T. Hutchinson et al. eds. 1967).

Carolina also extended copyrights to existing published works.[43]

In 1790, Congress adopted the first copyright statute under the new Constitution. Like the Statute of Anne, the Act of 1790 was styled "An Act for the encouragement of learning . . . ." The Act granted a copyright of fourteen years for new works, and fourteen years from the date of recording for "any map, chart, book or books already printed within these United States" to the author or to the author's "executors, administrators or assigns."[44] By choosing the Statute of Anne's retroactive form over some state regimes that protected new works only, Congress made especially clear its endorsement of extending copyrights to existing works. The First Congress's interpretation of its Copyright Clause authority is entitled to "very great weight."[45]

Congress repeatedly extended intellectual property rights retroactively over the following two centuries. In 1808, for example, Congress extended the patent of Oliver Evans by fourteen years when Evans was deprived of much of the enjoyment of his patent rights due to an administrative error.[46] In 1828, Congress extended a copyright belonging to James Rowlett.[47] In 1831, Congress passed a new copyright statute,

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[43] *See* BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 108-24 (1967). Connecticut, New Jersey, Maryland, Pennsylvania, North Carolina, Georgia, and New York did not extend copyrights to newly published works.

[44] Copyright Act of 1790, 1 Stat. 124 (1790).

[45] *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

[46] *See* An Act for the Relief of Oliver Evans, 6 Stat. 70-71 (Jan. 21, 1808); *see also Bloomer v. McQuewan*, 55 U.S. 539, 543 (1852) (listing additional patent extensions).

[47] 6 Stat. 389-90 (May 24, 1828). One *amici* brief argues that Rowlett's copyright claim was based on the invalid "sweat-of-the-brow" theory rejected in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 390 (1991). *See* Br. *Amici Curiae* of Tyler T. Ochoa, et al. [hereafter "Ochoa Br."], at 24. The issue, however, is not the validity of Rowlett's copyright, but the confidence of members of Congress at that early date that they had authority to extend the copyrights of already published works.

requiring recordation of copyrights, and lengthening the initial terms of new and existing copyrights to twenty-eight years.[48] The Copyright Act of 1909 likewise extended the copyright renewal term to twenty-eight years for new and existing works,[49] followed by the Copyright Act of 1976, which extended the term for new and existing works by various formulae intended to approximate the new standard term of life of the author plus fifty years.

Petitioners and their *amici* contest the force of these precedents; they argue, in essence, that the Act of 1790 was *too early* to constitute a retroactive extension, but that all of the subsequent legislation occurred *too late* to reflect the Constitution's original meaning. But neither end of that vise-grip argument has force. The 1790 extension of rights in existing works demolishes Petitioners' argument notwithstanding that those prior works were copyrighted under state law, and the subsequent extensions cannot be dismissed as too late to count when they are part of an impressive, unbroken chain: virtually every significant piece of copyright legislation adopted in Britain and the United States between 1700 and 1996 extended additional copyright protection to previously published works.

C. The Framers' Suspicion of Monopolies Is Irrelevant To The Issues Before This Court.

Lacking direct historical support for their claims, Petitioners analogize the CTEA's supporters to the corrupt British ministers who vexed the Framers and the London booksellers despised by Milton.[50] But Petitioners misrepresent both the real object of the Framers' concern and the extent to which the Framers shared it.

The argument that the Framers so abhorred monopoly powers – which Petitioners implicitly define as any grant of

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48 Copyright Act of 1831, 4 Stat. 436 (1831).

49 Copyright Act of 1909, 35 Stat. 1075 (1909).

50 *See* Pet'r Br. at 27 nn. 10 & 11; Ochoa Br. at 29-30.

exclusive rights, including copyrights and patents[51] – that they came close to banning all monopolies relies almost exclusively on a selection of quotations from Thomas Jefferson, unsurprisingly, for among the Framers, Jefferson had some of the most alarmist views about monopolies.[52] And Jefferson did indeed propose a constitutional amendment that would have prohibited the granting of any government monopoly, and inserted in the Constitution a specific term for patents and copyrights.[53]

Petitioners' reliance on the "monopoly" issue, however, is misplaced. When they spoke of "monopolies," the Framers did not mean what we would mean by the term today; rather, they referred to the reviled practice by which the British Crown granted numerous favors to wealthy individuals.[54]

This arbitrary, corrupt system extended to the granting of patents and the licensing of books. Exclusive rights were granted to businesses, and laws such as the Licensing Act of Charles II were passed to invest selected publishing companies with the power to control the press to the Crown's benefit.[55]

But the problem was not limited to or focused on intellectual property. Favorites of the Crown were given colonial governorships, judicial office, and lucrative business opportunities of all kinds. "These corporate privileges were not frequently granted or widely available; they were made at the initiative of the government, not private interests." Indeed,

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51 *See* Pet'r Br. at 25-26.

52 *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 320 (1991) (contrasting Jefferson's belief that corporate grants should be limited with the actual practice of state legislatures).

53 Letter from Jefferson to Madison, Aug. 28, 1789, *available at* http://memory.loc.gov/ammem/mtjhtml/mtjhome.html.

54 *See* WOOD, *supra*, at 82, 318-19.

55 EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 54-56 (Boston, Little, Brown & Co., 1879). "The declared purpose of the Stationers' Company," for example, "was to prevent the propagation of the Protestant Reformation." *Id.* at 55-56.

the South Sea Bubble, whose collapse in 1720 precipitated a severe economic crisis in England, with fortunes ruined and revelations of widespread corruption among the directors and their cronies at Westminster, resulted from such politically bestowed monopolies.[56]

By the time of the Revolution, many in both England and America came to regard such practices as hopelessly corrupt. Beginning in the early seventeenth century, Parliament began taking action against some of the more egregious abuses. For example, in 1624 Parliament passed the Statute of Monopolies, which abolished several forms of monopoly, and limited patents to twenty-one years for existing patents and fourteen years for new ones. The Statute of Anne, by vesting initial copyright in authors and limiting the terms, was in some ways a response to earlier laws such as the Licensing Act.

The Framers were part of this reform effort. Drawing on the lessons of the South Sea Bubble and other instances of British "corruption", they believed strongly that the government should not be allowed to bestow special favors to a few that were not available to all. It was for this reason that Elbridge Gerry and George Mason refused to sign the Constitution, and four states during the ratification debates sought restrictions prohibiting the granting of "exclusive advantages of commerce."[57]

But the "monopolies" Gerry and Mason opposed were discretionary grants of authority to powerful individuals, not all forms of exclusive rights. And even so, many Framers understood such "monopolies" to be essential, in the absence of a powerful central government, to building internal improvements, creating banks, and undertaking other

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[56] *See* WOOD, *supra*, at 319. On the South Sea Bubble crisis, see generally BRAY HAMMOND, BANKS AND POLITICS IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR (1957).

[57] Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 19 HAMLINE L. REV. 81, 91 (quoting 6 THE AMERICAN MUSEUM 303 (1789)); *see also* Ochoa Br. at 19.

necessary enterprises.[58] Thus, Congress did not adopt Jefferson's proposal to prohibit all monopolies except patents and copyrights.[59] Madison, Benjamin Franklin and James Wilson all proposed adding a provision to Article I, Section 8, granting Congress the authority "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent," so that Congress might build canals, universities or other improvements.

The Framers were even less concerned about "monopolies" over books and inventions. As Hamilton observed in his Report on Manufactures, "[t]he propriety of stimulating by rewards, the invention and introduction of useful improvements, is admitted without difficulty."[60] Madison noted in the *Federalist No. 43*, that the "utility" of the Copyright "power will scarcely be questioned." The relative lack of controversy over the granting of "monopolies" to reward authors and inventors was no doubt due to the belief, widely shared by the Framers, that "[w]hile a monopoly was conceived as consisting 'in restraining the common right,' there was no unjust encroachment in the case of invention since nothing had existed previously."[61]

It is thus correct, as Petitioners and *amici* have argued, that the Framers were deeply concerned with "monopolies," but incorrect that this concern supports their challenge. The Framers' primary concern with respect to copyrights, as with all monopolies, was that they be available to all and not abused for partisan ends. Even Ochoa, Rose, and Walter-

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[58] *See generally, e.g.*, OSCAR HANDLIN & MARY FLUG, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861 (1969); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1880 (1948).

[59] *See* Letter from Jefferson to Madison, Aug. 28, 1789, *supra*.

[60] Alexander Hamilton, *Report on Manufactures*, *in* 10 PAPERS OF ALEXANDER HAMILTON 338-40 (Harold C. Styrett et al. eds. 1961).

[61] CHRISTINE MACLEOD, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660-1800, at 183 (1988).

scheid admit as much: the Copyright Clause, in their view, "appears to have been aimed at preventing the kinds of abuses that had prompted the Statute of Monopolies one hundred and fifty years earlier."[62] Petitioners have therefore placed the emphasis on the wrong word in the Copyright Clause. The Framers did not intend to require courts to hold copyright legislation to a specific standard of "progress;" rather, they intended to limit the purposes for which copyright legislation might be passed to the promotion of "the Useful Arts," as opposed to the promotion of political patronage, or of the President's religious views.[63] Given that copyrights are available to all authors, and that the benefits of the CTEA apply equally to all copyrights, the Framers' concerns with discretionary "monopolies" are simply not implicated by the CTEA.

D. The Framers Intended To Vest Congress With The Authority To Determine The Proper Term For Copyrights.

The Framers gave Congress discretion to adapt to changed circumstances by setting the boundaries of copyright, including its term. Had they intended otherwise, they would have adopted Jefferson's suggestion of limiting copyrights to a constitutionally specified term. Since they did not, this Court was correct in demarcating the proper term for copyrights and patents as "subject to the discretion of Congress."[64]

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62 Ochoa Br. at 17.

63 *See Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

64 *Pennock & Sellers*, 27 U.S. at 16-17.

III. Regarding Existing Works, Petitioners' Arguments Would Require Invalidation Of Not Only The CTEA But Also Any Prior Term Extensions And Other Expansions Of Copyright, And Substantial Reliance Interests Warrant Rejection Of Petitioners' Arguments

A. Petitioners' Theory Implicates Not Only The CTEA But Also Prior Copyright Extensions And Changes.

Petitioners argue that the "retroactive" extension of the term of pre-existing works violates the "Limited Times" requirement of the Copyright Clause. To begin with, the CTEA is not "retroactive" because it retrieves no works already in the public domain, but rather, merely "disappoints the expectation that the work was going to go into the public domain at the end of 1998, as opposed to twenty years thereafter."[65] But, if the public has a vested interest of a constitutional dimension in a work falling into the public domain on an expected date, "then it follows that every term extension after 1790 is constitutionally infirm."[66] Indeed, if one accepts Petitioners' logic, "[p]erhaps the public had a vested interest in the public domain being whatever the subject matter and scope of copyright was at the time that each of those works was created. That would mean, for example, that any sound recording created before enactment of the Digital Performance Right in Sound Recordings Act of 1995 should not enjoy such a performance right today."[67] And it would mean, for example, that Congress' decision to include photographs in the definition of copyrightable subject

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65 Ginsburg, *supra*, at 702.

66 *Id.* at 703.

67 *Id.* at 704.

matter was unconstitutional, and that *Burrows-Giles Lithograph* was wrongly decided.[68]

Conceding, as they must, that "a rule against retroactive copyright extensions would cast into doubt the 1831 and 1909 Acts, and possibly the 1976 Act," Petitioners proffer a basis to distinguish the CTEA from prior extensions: the CTEA extension is automatic, they say, while the 1831 and 1909 extensions were contingent on registration, renewal, or the like. Pet'r Br. 30 n.13. Petitioners do not explain why the presence or absence of these *pro forma* requirements bears any relevance to the constitutionality of retroactive copyright extensions, and the 1976 extension, which Petitioners conspicuously fail to mention in their footnote, was automatic. Petitioners entirely fail to demonstrate how the CTEA or prior extensions "can be distinguished from the CTEA," *id.*, and in considering their arguments the Court must consider the extent to which those arguments would upset a huge range of existing rights resting on prior durational and other changes in copyright law.

B. Substantial Reliance Interests Warrant Rejection Of Petitioners' Arguments.

For twenty-five years, artists and executives in the music, film, print, and other industries have done business on the understanding that the rights Congress granted them in 1976, and before and after as well, were settled and secure. Reliance on those rights undergirded innumerable transactions concerning tens of thousands of works and hundreds of millions of dollars. As Professor Arthur Miller notes:

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[68] *See also* Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y U.S.A. 137, 172-173 (Winter 1993) (footnotes omitted) ("When Congress...expanded the scope of copyright to include the right of public display (presumably applying to existing works as well), or of public performance or musical works whether or not for profit, or added the cable compulsory license, or added certain moral rights for visual artists in 1990, [it] affected existing as well as future works....").

> We have enormous industries that invest millions of dollars into works of expression – from books to phonograph records, television shows, motion pictures and Internet systems. That is the way we disseminate copyrighted works, and thank goodness – because that enables us to disseminate not simply on Fifth Avenue and Forty-Second Street, but to the four corners of the globe through the Internet. That takes money. It takes capital. You must attract capital into the copyright industries or you will not achieve the purposes of the Copyright Clause. You attract capital by making sure those industries have a rate of return. It is not simply Hawthorne sitting at his desk with a quill. We have to provide incentives for a whole raft of people and industries to invest capital in order to promote the progress of science and the useful arts.... We must incentivize the dissemination industries, the preservation industries, and the derivative work industries.[69]

Petitioners' theory would unsettle, for tens of thousands of copyright owners, rights established by the 1976 Act and the extensions leading up to it. Countless transactions would risk being undone, and countless investment-backed expectations denied.

The Court's recent warning that "courts must be cautious before adopting changes that disrupt the settled expectations of the inventing community" applies with equal force to the community of copyright holders: where the law in an area is "settled," "fundamental alterations in these rules risk

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[69] Ginsburg, *supra*, at 692-93.

destroying the legitimate expectations of . . . countless" creators and investors "in their property."[70]

Indeed, *Festo's* warning is even more compelling here. Though the "doctrine of equivalents" at issue in *Festo* had been occasionally reaffirmed, those reaffirmances were part of a continuing "debate,"[71] marked by vociferous dissents, hesitant decisions acknowledging unfortunate uncertainty, and repeated adjustments of the doctrine by Congress and the courts.[72] Copyright term extensions for pre-existing works date back even further, and the history of those extensions is remarkably free of debate and dissent. As Petitioners note, no court, and evidently no prior litigant, has ever challenged the constitutionality of such extensions.[73] Indeed, Petitioners' observation that "the 1909 and 1976 statutes simply followed the examples that preceded them"[74] is precisely on point: Congress evidently treated the constitutionality of copyright term extensions for pre-existing works as "settled" in 1909, from 1961 to 1976, and again in 1998. Given Congress's settled view, its repeated legislation based on that view, and the fact that no court has ever before doubted the constitutionality of that practice, *Festo's* instruction that "[t]here is no justification for applying a new [rule] to those who relied on a prior doctrine"[75] applies powerfully here.

This Court has repeatedly stressed the importance of not lightly disrupting settled expectations. In *Landgraf v. USI Film Products*,[76] for example, this Court emphasized that

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[70] *Festo v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, __ U.S. __, 122 S. Ct. 1831, 1841 (2002), *citing Warner-Jenkinson v. Hilton Davis Chem. Co.*, 520 U.S. 17, 20, 28 (1997) (reaffirming the doctrine of equivalents in light of its "lengthy history").

[71] *Id.* at 20.

[72] *See generally Festo, supra.*

[73] Pet'r Br. at 30. *See also Eldred v. Reno*, 239 F.3d 372, 372 (D.C. Cir. 2001) (observing that no appellate court had ever before addressed the constitutionality of extensions as applied to existing works).

[74] *Id.*

[75] *Festo*, 122 S. Ct. at 1841.

[76] 511 U.S. 244, 270 (1994).

reliance interests deserve particular deference when contractual or property rights are at issue, "matters in which predictability and stability are of prime importance."[77] "In a free dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."[78]

C. There Has Been A Great Deal Of Actual Reliance On The 1976 Copyright Extension And Other Non-durational Extensions.

In 1976, Congress extended the duration of all existing copyrights,[79] as the culmination of a series of interim extensions started in 1962.[80] Like previous retroactive copyright extensions, the scope of those extensions was substantial; they affected the copyright terms of almost every

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[77] *Id.* at 256. *See also Nordlinger v. Hahn*, 505 U.S. 1, 14 (1992); *Heckler v. Mathews*, 465 U.S. 728, 746 (1984); *New Orleans v. Dukes*, 427 U.S. 297, 305 (1976); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

[78] *Landgraf*, 511 U.S. at 266. *See also, e.g., Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953) (refusing to make ruling retroactive because "the business has...been left for thirty years to develop, on the understanding that it was not subject to existing...legislation"), see also *Radovich v. National Football League*, 352 U.S. 445, 450-51 (1957) (same).

[79] Copyright duration was 56 years under the 1909 Act, composed of a 28-year first term, renewable for a further 28 years. For most existing works, the 1976 Act left the first term at 28 years but extended the second term from 28 to 47 years, bringing the total term of protection to 75 years. Copyrights already in their second term received the additional 19 years automatically; copyrights in their first term received the full 47 year second term upon renewal. 1976 Act, § 304 (a), (b). *See* ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 318 *et seq.* (4th ed. 1993). Unless otherwise noted, this discussion assumes that copyright holders renewed their copyrights at the end of the first 28-year term, and were thus entitled to the full 75 years of protection granted by the 1909 and 1976 Acts.

[80] *See* Pet'r Br. at 2 n.1 (collecting extensions).

work copyrighted in the United States between 1910[81] and 1976, provided that the copyright had been renewed. The result was lengthened copyright protection for more than a half-century of creative activity.

The Congressional Research Service ("CRS") estimates that, in the twenty-year period between 1922 and 1941, copyrights were registered to no less than 77,000 works – or 3,850 works *per year*, on average – that continue to earn royalties for their full seventy-five-year term.[82] Extrapolating from this twenty-year period to the full sixty-six year period at issue here, the number of works significantly affected by the 1976 extension is in the range of 250,000.[83] These 250,000 works, like any other piece of property or any other investment, produce income and the rights in many of them have been bought, sold, and traded, used as collateral, and otherwise relied upon, by creators and industry, in the quarter century since passage of the 1976 Act.

Dollar amounts are similarly reflective of the huge reliance interests at stake. CRS estimates that approximately 49,000 books, musical works, and movies were copyrighted between 1922 and 1941 that were still earning royalties at the end of their copyright term; CRS further estimates that the additional nineteen years of royalties that Congress granted to these works in 1976 was worth approximately

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[81] Works created before 1910 were subject to the term set by the 1831 Copyright Act which granted 42 years of protection, and their copyrights had all expired by 1951—well before the first interim extension in 1962.

[82] Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values, in* CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, at 8, 12, 15, 16 (May 11, 1998).

[83] Again, this number takes into account that only a small number of works are renewed, and an even smaller number have enduring value to their creators in the form of royalties for decades following their publication. (Without accounting for these things, the numbers would be far larger: there were approximately 167,000 first-time copyright registrations a year, on average, between 1923 and 1941; for the full 65-year period, the equivalent number would be on the order of ten million.)

$317,000,000.[84] Again extrapolating from the twenty-year period to the sixty-six year period at issue here, the additional royalties on books, music, and movies that Congress granted in the 1976 Act is on the order of one billion dollars.

Works affected by the 1976 extension include some of the 20th century's greatest creative and artistic achievements. Even limiting the inquiry to copyrights that are set to expire by 2010 under the 1976 Act – copyrights, that is, in which the Act's nineteen-year extension has already lapsed or will do so shortly – Petitioners' theory would unsettle the ownership status of books like Faulkner's *The Sound and The Fury* (1929), Fitzgerald's *The Great Gatsby* (1925) and Hemingway's *A Farewell to Arms*; musical works like Copland's *Appalachian Spring* (1944), Gershwin's *Rhapsody in Blue* (1924) and *Porgy and Bess* (1935), and Duke Ellington's *Take the 'A' Train* (1938); and movies and musical theater works like *Oklahoma* (1943), *The Wizard of Oz* (1939), *Gone with the Wind* (1939), and *Casablanca* (1942).[85] *See* Appendix, *infra* for examples of other works.

Transactions executed in at least partial reliance on the 1976 Act have been large and numerous. To give just a few examples, Turner Broadcasting System acquired Metro-Goldwyn-Mayer ("MGM") for $1.5 billion in 1985 with the primary purpose of acquiring MGM's film library.[86] In 1999,

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[84] Rappaport, *supra*, at 16 (all amounts in 1997 dollars).

[85] By virtue of the 1976 Copyright Act and the CTEA, each of these works is still under copyright protection. Royalties on many of these works is substantial: The Rodgers and Hammerstein Organization earns $10 million annually in royalties and licensing fees; a nationwide license for a Gershwin song, worth between $45,000 and $75,000 fifteen years ago, now earns more than $250,000; Rhapsody in Blue became United Airlines' theme song for an estimated $500,000. David D. Kirkpatrick, *Media; Publishers and Libraries Square Off Over Free Online Access to Books*, N.Y. TIMES, June 17, 2002, at C7.

[86] Geraldine Fabrikant, *Turner To Sell MGM Assets*, N.Y. TIMES, June 7, 1986, at A35. ("after [$300 million in] asset sales, Mr. Turner will have paid about $1.2 billion for the property he sought in the MGM purchase, the studio's film library.")

EMI Records acquired the Windswept Pacific music catalog, which included more than 40,000 titles from early rock and roll to modern pop songs, for 126 million pounds (approximately $200 million).[87] And during the last decade, Viacom acquired Simon & Schuster and Bertlesmann acquired Random House.

Copyrights, of course, are bought and sold every day, and these large transactions are just a small subset. Petitioners' theory would throw countless transactions, large and small, into doubt, potentially rendering vast numbers of copyrights and copyright-driven transactions uncertain and insecure.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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[87] *EMI Pays Pounds 11.5m for Stake in Phil Collins Music Publisher*, THE INDEPENDENT, November 4, 1999, at 23.

APPENDIX

Selected Copywritten Works
1910-1954

Books

Edith Wharton	Ethan Frome	1911
Robert Frost	Poetry from A Boy's Will - through - The Road Not Taken	1913 1951
Agatha Christie	The Mysterious Affair at Styles	1920
Willa Cather	One of Ours	1921
T. S. Elliot	The Waste Land	1922
P.G. Wodehouse	The Inimitable Jeeves	1923
Sherwood Anderson	Horses and Men	1923
F. Scott Fitzgerald	The Great Gatsby	1925
Langston Hughes	Poetry from The Weary Blues - through - Montage of a Dream Deferred	1926 1951
Sinclair Lewis	Arrowsmith	1926
Virginia Wolf	To the Lighthouse	1927
William Faulkner	The Sound and the Fury As I Lay Dying	1929 1930
Thomas Wolfe	Look Homeward, Angel - through - A Western Journey	1929 1951
Pearl S. Buck	The Good Earth	1931
Aldous Huxley	Brave New World	1932
James Hilton	Lost Horizon	1933
Margaret Mitchell	Gone with the Wind	1936
J. R. R. Tolkein	The Hobbit	1937

Thornton Wilder	Our Town	1938
John Steinbeck	The Grapes of Wrath	1939
Eugene O'Neill	The Iceman Cometh Long Day's Journey Into Night	1939 1941
Ernest Hemingway	The Sun Also Rises A Farewell To Arms For Whom the Bell Tolls	1926 1929 1940
Eudora Welty	A Curtain of Green	1941
Tennessee Williams	The Glass Menagerie A Streetcar Named Desire	1945 1947
W.H. Auden	The Age of Anxiety	1947
Norman Mailer	The Naked and the Dead	1948
George Orwell	Nineteen Eighty-four	1949
Arthur Miller	Death of a Salesman The Crucible	1949 1953
Ray Bradbury	Fahrenheit 451	1953
Herman Wouk	The Caine Mutiny	1954

Music

W.C. Handy	St. Louis Blues	1914
George Gershwin	Rhapsody in Blue An American in Paris Porgy & Bess	1924 1928 1935
"Jelly Roll" Morton	Smokehouse Blues	1926
Jerome Kern	Showboat	1927
Igor Stravinsky	Symphony of Psalms	1929
Edward "Duke" Ellington	It Don't Mean a Thing if it Ain't Got that Swing Mood Indigo	1932 1933
Cole Porter	Anything Goes	1934
Irving Berlin	Cheek to Cheek	1935

Harry Warren	Lullaby of Broadway Chattanooga Choo Choo You'll Never Know That's Amore	1935 1941 1943 1953
Jerome Kern	The Way You Look Tonight	1936
Lorenz Hart	My Funny Valentine	1937
Samuel Barber	Adagio for Strings	1938
Aaron Copland	Billy the Kid Appalachian Spring	1938 1944
Duke Ellington	Take the 'A' Train	1938
Ella Fitzgerald and Al Feldman	A-Tisket A-Tasket	1938
Harold Arlen	Over the Rainbow Blues in the Night White Christmas	1939 1942 1942
Leigh Harline	When You Wish Upon A Star	1940
Rodgers & Hammerstein	Oklahoma! Carousel South Pacific The King and I	1943 1945 1949 1951
Woody Guthrie	This Land is Your Land	1944
Consuelo Velazquez	Besame Mucho	1944
Charlie Parker	Groovin' High	1945
Irving Berlin	Annie Get Your Gun	1946
William "Count" Basie	Stay Cool	1946
"Dizzy" Gillespie	A Night In Tunisia	1946
Jule Styne	Let It Snow, Let It Snow, Let It Snow	1946
William Best	For Sentimental Reasons	1946
Johnny Marks	Rudolph the Red Nosed Reindeer	1949
Frank Loesser	Guys & Dolls	1950
Jack Rollins	Frosty the Snowman	1950

Art Tatum	Stompin at the Savoy	1953
Bob Merrill	How Much Is That Doggie In Window	1953
Pat Ballard	Mister Sandman	1954
Bill Haley	Rock Around the Clock	1954

Movies

Ben-Hur	1926
The Jazz Singer	1927
Duck Soup	1933
King Kong	1933
It Happened One Night	1934
Snow White and the Seven Dwarfs	1937
Gone With the Wind	1939
The Wizard of Oz	1939
Fantasia	1940
Citizen Kane	1941
The Maltese Falcon	1941
Casablanca	1942
Double Indemnity	1944
It's a Wonderful Life	1946
Singin' in the Rain	1952
On the Waterfront	1954

AMICI CURIAE

Association of American Publishers is the national association in the United States of publishers of general books, textbooks and educational materials. The AAP's approximately 300 members include most of the major book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations.

Amberson Holdings LLC owns or controls the copyrights to the works of Leonard Bernstein.

Richard Avedon is a photographer whose images are circulated around the world.

The George Balanchine Trust owns or controls the copyrights to most of the choreographic works of America's leading choreographer.

Peter Bartók owns or controls the copyrights to many of Béla Bartók's compositions.

Boosey & Hawkes, Inc. is the publisher of many of America's most important composers of concert and operatic works, from the 20th-century masters such as Aaron Copland and Alberto Ginastera, to leading figures of the present day, including John Adams, Elliott Carter, and Steve Reich.

The Aaron Copland Fund For Music, Inc. was founded under the will of Aaron Copland to encourage and improve public knowledge of contemporary American concert music and jazz. Since 1992, the Copland Fund has awarded more than $9 million to support the recording, performance and other dissemination of American Music, both in the United States and around the world.

European-American Music Corporation and its affiliate Helicon Music Corporation, publish a substantial catalogue of concert works by living American composers, including Robert Beaser, Kamran Ince, Stephen Paulus, Tobias Picker, Bernard Rands, Christopher Rouse, Joseph Schwantner and Alvin Singleton, among others.

The George Gershwin Family Trust is a private entity which administers certain rights in the works of George Gershwin . The Trustees, both on behalf of the Trust and as individuals, are active in the support of the arts and of creative works, old and new.

The Leonore S. Gershwin Trust for the benefit of the Ira and **The Leonore Gershwin Philanthropic Fund and The Leonore S. Gershwin Trust for the benefit of The Library of Congress**, both funded by revenues derived solely from copyrights in the works of Ira Gershwin, support a significant number of charitable institutions, including arts organizations which, in turn, support the work of new artists, as well as the documentation and preservation activities of the United States Library of Congress.

The Keith Haring Foundation helps fund a children's medical center, offers an art education scholarship, and supports local and national AIDS charities. These efforts have all been funded by income derived from the exploitation of Keith Haring's copyrighted images.

The Frederick Loewe Foundation, Inc. supports New Dramatists and other organizations for the development of young writers, particularly in the music theatre.

David Mamet is a Pulitzer Prize-winning Playwright.

Glen Roven is a composer.

The Kurt Weill Foundation for Music, funded solely by copyright royalties, maintains the Weill-Lenya Research Center in New York City, publishes a complete edition of Weill's works and other educational materials, and sponsors grants and prizes to performers, composers, and scholars.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General,
Respondent.

BRIEF FOR *AMICI CURIAE* REPRESENTATIVES F. JAMES SENSENBRENNER, JR., JOHN CONYERS, JR., HOWARD COBLE, AND HOWARD L. BERMAN IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

Amici curiae are the bipartisan leaders of the House Committee on the Judiciary and its intellectual property subcommittee: Reps. F. James Sensenbrenner, Jr., and John Conyers, Jr., the Chairman and Ranking Member of the House Committee on the Judiciary; and Howard Coble and Howard Berman, the Chairman and Ranking Member of the House Committee on the Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property. *Amici* played a major role in securing Congressional passage of the Sonny Bono Copyright Term Extension Act ["the CTEA"], Pub. L. No. 105-298, Title I, 112 Stat. 2827 (1998).

Amici have dual interests in upholding the constitutionality of the CTEA. First, *amici* have an institutional interest in upholding Congressional authority to enact copyright legislation that is consistent with the text and purpose of the Copyright Clause. Second, *amici* have a substantive interest in ensuring that copyright law is responsive to demographic, commercial, and technological changes, both domestically and internationally. Petitioners here would undermine those interests by breaking with centuries of Constitutional tradition and subjecting copyright laws to cramped, formalistic, and ultimately unsustainable interpretations of both Article I, § 8 ["the Copyright Clause"] and the First Amendment.

SUMMARY OF ARGUMENT

This case concerns fundamental copyright policy decisions that, as this Court has consistently recognized, the Framers vested in Congress and not in the courts. In 1998,

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. In accordance with Rule 37.76, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

petitioners and their supportive *amici* sought to persuade Congress not to extend the term of copyright. Although Congress carefully considered their viewpoints, it rejected them and enacted the CTEA, extending the term of copyright for new and existing works by twenty years. Having failed to persuade Congress of their point of view, petitioners are now seeking to transform their policy disagreement into a legal dispute of purportedly constitutional dimension. Their request should be rejected.

In a significant concession, petitioners do not challenge Congress's power to extend copyright terms *prospectively*—*i.e.*, for works of authorship created after an extension's effective date. "Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court." Pet. Br. at 14. Rather, they challenge only the power of Congress to extend the term of copyright *retrospectively*—*i.e.*, for works in existence when an extension is enacted. According to petitioners, *any* extension of an existing term necessarily violates the "Progress," "limited Times," and originality requirements of the Copyright Clause, and cannot pass the purportedly applicable First Amendment scrutiny. To petitioners, the actual length of the extension—be it twenty days or twenty years—is irrelevant, for "[t]he line between *prospective* and *retroactive* extensions is a clear one." Pet. Br. at 14.

The problem with the "line" petitioners wish to draw is that, while it is "clear," it finds no support in the Constitution. Indeed, petitioners' "clear line" would eviscerate two centuries of constitutional tradition by invalidating an act of the First Congress in 1790, as well as a dozen successive copyright acts—none of which have been found to exceed the Constitution's grant of authority to Congress.

1. The CTEA's extension of the terms of existing works promotes "Progress" and otherwise satisfies the requirements of the Copyright Clause. In periodically expanding the scope of copyright to respond to changes in commerce, demographics, and technology, Congress has most often protected both future *and existing* copyrights. This Court has consistently recognized Congress's institutional authority to promote such progress, and has never suggested (nor has any court ever held) that protecting *existing* copyrights exceeds that authority.

Petitioners assert that the authority of Congress to promote progress exists for one purpose only: to induce the creation of *new* works. But the Framers' view was not so constricted. Of course, *amici* acknowledge that the grant of power under the Copyright Clause is not absolute, and that the Clause—and this Court's cases—place limits on the exercise of Congress's copyright power. *Amici* disagree with petitioners, however, over the contours of those limits, and the scrutiny with which this Court should analyze those Congressional enactments.

Each of petitioners' arguments against the extension of the term of copyright to existing works was carefully considered during a legislative process that stretched over several years; however, these arguments were ultimately rejected by the body that the Framers determined should make such decisions: Congress. Thus, the CTEA reflects the considered judgment of Congress that extending *existing* copyright terms in the face of meaningful changes in commerce, demographics, and technology would promote progress by: (1) encouraging authors to create derivative works; (2) providing incentives to create new works; (3) preserving existing works; (4) disseminating existing works; and (5) harmonizing United States copyright protection with that of our major trading partners. It therefore satisfies the dictates of the Copyright Clause.

2. The CTEA creates no conflict with the First Amendment. *Amici* recognize that the Constitution's speech-protecting principles place limits on the reach of Congress's copyright protecting power. But this Court has held that, as long as copyright protects only expression, not ideas, and makes even expression subject to "fair use" by other speak-

ers, it strikes a "definitional balance" with the First Amendment. The CTEA reflects Congress's careful efforts to maintain this balance. On that, petitioners cannot disagree. Instead, they urge the overlay of intermediate scrutiny on top of this definitional balance. However, their argument ignores the unique ways in which speech interests are affected by the intersection of the Copyright Clause, copyright legislation, and the First Amendment. Their argument also ignores the established speech-protecting limits to which copyright is already subject. In the final analysis, the CTEA is a permissible exercise of Congress's power, reflecting a policy choice by Congress setting the duration of copyright, and respecting the idea/expression dichotomy and the fair use doctrine. The overlay of intermediate scrutiny here is thus both unwarranted and unworkable.

In short, the CTEA is a core exercise of Congress's power under Article I of the Constitution. It promotes progress, creates an engine of free expression, and strikes a definitional balance with the First Amendment. Accordingly, it should be upheld.

ARGUMENT

Petitioners imply that the CTEA is a piece of narrow, special interest legislation, passed under cover of darkness, without careful consideration. That is simply not so. The CTEA was the product of years of legislative consideration, numerous hearings, and a 1993 study by the Copyright Office on the duration of copyright (which itself followed an extended public comment period). *See Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 182-83 (1995) ["1995 House Hearings"] (Statement of Marybeth Peters, Register of Copyrights ("Peters statement")). In enacting it, Congress was mindful of the scope of its constitutional responsibility. *See*

144 Cong. Rec. H1459 (Mar. 25, 1988) (remarks of Rep. Sensenbrenner). Congress took into account the public's interest in the public domain, and specifically considered the issues raised by petitioners here. Congress also considered the various issues raised by the *amici* supporting petitioners.[2] Congress not only listened to these concerns; it wrote the CTEA to address many of them.[3]

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[2] Congress heard the concerns of the libraries, archivists, and digital database creators who criticized a twenty-year postponement of works entering the public domain. *See, e.g.*, 1995 House Hearings at 182-204, 676-679. Congress also heard the concerns of scholars, museums, teachers and artists who noted the practical difficulties of finding successors-in-interest to old copyrighted materials of academic importance. *See, e.g., The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Judiciary Comm.*, 104th Cong. 18 (1995) ["1995 Senate Hearings"]. Congress heard concerns about preserving older works, including motion pictures. *See, e.g.*, 1995 House Hearings at 64-73, 281-89, 423-502. Congress heard from intellectual property law professors, who address to this Court their disagreements with the policy balance Congress struck. *See, e.g., id.* at 290-311 (statement of Professor Karjala on behalf of the U.S. Copyright and Intellectual Property Law Professors). And Congress listened to extensive testimony from Professor Peter Jazsi, the author of the Brief of *Amici Curiae* National Writers Union, Charles Baxter, Wendell Berry, *et al.* *See, e.g.*, 1995 Senate Hearings at 71-90, 123-27.

[3] For example, the CTEA extended the termination rights found in 17 U.S.C. § 102(d) to readjust the balance between authors/heirs and current copyright owners. CTEA, Title I, § 103, 112 Stat. at 2829. The CTEA also amended 17 U.S.C. § 108 to give libraries, archives, and nonprofit educational institutions a defined right to reproduce, distribute, display, or perform (even digitally) works that are in their last twenty years of copyright for purposes of preservation, scholarship, or research, particularly in situations where the work is not being commercially exploited or copies cannot be obtained at a reasonable price. *See id.*, § 104, 112 Stat. 2829. That amendment created a "carefully crafted, balanced library exemption that ensures that the legitimate needs of the libraries are met." 144 Cong. Rec. at H1465 (Representative Conyers). And Congress, led by the efforts of Representatives Sensenbrenner and McCollum, enacted provisions to protect the use of copyrighted works by

(footnote continues on next page)

In so doing, Congress fully considered the costs of term extension. *See, e.g.*, 1995 House Hearings at 86. But Congress—quite rightly—also considered the costs of *failing* to enact term extensions. *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994) (Kennedy, J., concurring) (the "underprotection of copyright [can] disserve[] the goals of copyright just as much as overprotection"). After weighing these issues, Congress enacted the CTEA and extended the term of copyright for new *and* existing works.

Petitioners and their *amici* disagree with the balance Congress struck. That is their prerogative. But those disagreements are over matters of policy that the Founders entrusted to Congress—not matters of constitutional law. *See* Brief of George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, *et al*. As explained in the sections that follow, petitioners' arguments to the contrary are incompatible with the text, structure, and history of the Copyright Clause and with Congress's exercise of its power under that Clause. As such, their challenge to the CTEA should be rejected, and the judgment of the Court of Appeals should be affirmed.

I. THE CONSTITUTION VESTS IN CONGRESS BROAD AUTHORITY TO "PROMOTE THE PROGRESS OF SCIENCE."

The Copyright Clause authorizes Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, par. 8. This power over patents and copyrights is vested in *Congress*—not the courts, the Executive, or the

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small businesses. Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, Title II, 112 Stat. 2827 (1998).

states. *See Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

The authorization of power in the Copyright Clause is based on Congress's "institutional ability" to draw the "difficult balance between the interests of authors and inventors" and "society's competing interest in the free flow of ideas, information, and commerce." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429, 431 (1984). Decisions over the scope and duration of intellectual property are generally resolved "within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) (patents). Such decisions require "the balancing of competing values and interests, which in our democratic system is the business of elected representatives." *Id.* Accordingly, the question of how long a copyright (or patent) term should endure is committed "to the discretion of Congress." *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 17 (1829) (patents); *Parker v. Flook*, 437 U.S. 584, 595 (1978) (Congress should answer the "[d]ifficult questions of policy concerning … the form and duration of [patent] protection").

Petitioners are incorrect to suggest that Congress may constitutionally exercise its authority to promote progress for one purpose only—to induce the creation of *new works*. Pet. Br. at 15-16. While encouraging the creation of new works is certainly a paradigm purpose of copyright, it is not the *only* constitutionally permissible purpose for Congress to consider. This Court has repeatedly confirmed that, in promoting "Progress" under the Copyright Clause, Congress can consider the whole gamut of "innovation, advancement or social benefit" the public may obtain from copyright. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *see also Fox Film Corp.*, 286 U.S. at 127 (the monopoly is justified by the "general benefits derived by the public from the labours of authors"). Copyright, as an "engine of free expression,"

"supplies the economic incentive to ... *disseminate ideas*." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (emphasis added). Thus, Congress is constitutionally permitted to consider all of the ways copyright may "serve the cause of promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).[4]

Because the Constitution vests in Congress broad power to promote progress under the Copyright Clause, this Court's review of the exercises of that power has been consistently deferential. On a number of occasions, the Court has specifically rejected attempts—like this one—to substitute restrictive views of "Progress" for those reflecting Congress's reasoned judgments. *See Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 529-30 (1972) ("direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts") (emphasis in original); *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (balancing costs and benefits of copyright law is "better addressed by Congress than the courts"); id. at 230 ("it is not our role to alter the delicate balance Congress has labored to achieve").

The Court of Appeals acted consistently with this precedent by asking—and answering in the affirmative—whether the CTEA "is a 'necessary and proper' exercise of the power conferred upon the Congress by the Copyright Clause." *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001). In so doing, the court tracked closely the directive of *McCulloch v. Maryland*, finding that "the CTEA [is] an 'appropriate' means, and 'plainly adapted' to the end prescribed in the

[4] The Brief of Intellectual Property Law Professors as *Amici Curiae* Supporting Petitioners ("IP Br.") confirms this view, arguing that the "Framers intended the Copyright and Patent Clause to give Congress the power" not only "to encourage the creation" of writings, but also "to encourage ... the broad dissemination, and widespread use of writings." IP Br. at 8.

preamble [of Article I, § 8]." *Id.*; *cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end . . . . are constitutional.").[5]

This standard of review correctly balances Congress's broad powers to promote progress under the Copyright Clause with the outer limits to which those powers are subject. With respect to those outer limits, we agree with petitioners that the Copyright Clause does not support the creation of trademark law, *see Trade-Mark Cases*, 100 U.S. 82 (1879), recognize a common law right, *see Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), or authorize the grant of exclusive rights for the creation of unoriginal works, *see Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991). These limits define the subject matter Congress may regulate under the Copyright Clause, and thus create logical stopping points for the exercise of Congress's power. But, within these recognized limits, this Court has always allowed "Congress [to] implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Graham*, 383 U.S. at 6; *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989) ("It is for Congress to determine if the present system . . . is ineffectual in promoting the useful arts . . . "). Thus, this Court at once properly places clear outer limits on the protectible subject matter of copyright, while deferring to Congress's decisions regarding how best to promote progress through regulating that protectible subject matter.

[5] Other courts have similarly recognized that their "role in judging whether Congress has exceeded its Article I [copyright power] is limited ... by the lenient standard of *McCulloch*." *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979).

II. THE EXTENSION OF EXISTING COPYRIGHTS UNDER THE CTEA PROMOTES "PROGRESS" AND CLEARLY FALLS WITHIN CONGRESS'S POWER UNDER THE COPYRIGHT CLAUSE.

A. Congress Appropriately Concluded That The CTEA's Extension Of Existing Copyrights Promotes The Progress Of Science.

Petitioners argue that the extension of an existing copyright cannot possibly "promote the Progress of Science" because "the incentive is being given for work that has already been produced." Pet. Br. at 22. In their view, "[r]etroactive extensions cannot 'promote' the past." *Id.* However, Congress's conclusion to the contrary is more consistent with history—and with common sense. There is no historical evidence that the Framers intended to require Congress to promote progress in any pre-ordained fashion. *See* Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. Intell. Prop. L. 315, 320 (2000) (the "Framers desired to give Congress authority to engage in the patent and copyright practice that had long been followed in England, but with discretion to modify it to meet American circumstances"). To the contrary, the Constitution recognizes that "[s]uccessive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammeled dissemination of ideas." *Sony*, 464 U.S. at 431 n.12 (quoting Foreword to B. Kaplan, An Unhurried View of Copyright vii-viii (1967)). The Constitution vests in Congress the "constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated" by new circumstances or new technologies, *id.* at 431, and Congress may promote the progress of science "by selecting the policy which *in its judgment* best effectuates the

constitutional aim." *Graham*, 383 U.S. at 6 (emphasis added).[6]

Here, as set forth in the CTEA's legislative history, Congress used its "judgment" in recognizing at least five ways in which the extension of existing copyright under the CTEA promotes the "Progress of Science." In the end, petitioners' disagreement with that judgment is a disagreement over the policy decision Congress made, and does not render the law unconstitutional.

1. Creating Derivative Works.

Congress determined that the CTEA's extension of existing copyright provides incentives for *existing* copyright holders to create important "derivative" works that would otherwise never be created. Congress recognized that "companies are more likely to invest resources in creating sequels or remakes of existing works if they know that the expiration of the copyright in the *original work* is more than twenty years in the future." 1995 House Hearings at 583 (Letter from Professor Paul Goldstein, Stanford Law School) (emphasis added).[7] Such incentives to create derivative works promote progress by furthering the dissemination of ideas and knowledge. S. Rep. No. 104-315, at 11-12 (1996); *see*

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[6] Petitioners argue that Congress must exact a new *quid pro quo* every time it decides to alter the scope or duration of existing intellectual property rights. Pet. Br. at 16. The cases petitioners cite, however, refer to the general benefits that a copyright regime is meant to serve. *See, e.g., Graham*, 383 U.S. at 6; *Brenner v. Manson*, 383 U.S. 519, 534 (1966); *Trade-Mark Cases*, 100 U.S. at 94; *Pennock*, 27 U.S. at 23. They do not define "Progress" in the narrow way petitioners suggest.

[7] *See also* 1995 House Hearings at 669 (incorporating article by Lisa M. Brownlee, The EC Term Directive, the Uruguay Round Agreements Act, and the Proposed U.S. Copyright Term Extension Act of 1995 (1995)) ("An author's incentive to create derivative works based upon pre-existing works is greatly increased if the underlying works are protectible.").

also generally Stewart, 495 U.S. at 228 (discussing the value to authors of derivative works); *compare Campbell*, 510 U.S. at 590 (1994) (in evaluating a person's right to make fair use of a copyrighted work, the Court must consider the "harm to the market for derivative works").

Petitioners do not deny the importance of derivative works. In fact, they extol the value of derivative works. Pet. Br. at 5-6 (describing petitioners' desires to "build upon and use content" from copyrighted work to create "derivative works"). But they seek to create those works without permission from, or payment to, the author. They believe that early expiration of existing copyrights will lead to the creation of more, or more important, derivative works than those created by existing copyright holders protected by term extension. Congress concluded the opposite—that "[f]ew are willing to make . . . significant expenditures for the creation of derivative works if they will have to compete with other derivative works based on the same underlying work. Therefore, the public is more likely to see high caliber derivative works if they are based on copyrighted works and made under authorization from the copyright proprietor." 1995 House Hearings at 633-34 (joint statement of the Coalition of Creators and Copyright Owners). That policy decision was amply supported by the record—and is emphatically one for the Congress, not the courts, to resolve.

2. Creating Future Works.

Congress also believed that the CTEA's extension of existing copyrights would lead to the creation of new works by *enabling* authors to create those works. Petitioners focus exclusively on the fact that term extension cannot *incentivize* the creation of a "work that has already been produced" because "[r]etroactive extensions cannot 'promote' the past." Pet. Br. at 22. Petitioners' argument, again, is grounded in a policy disagreement—not constitutional law. It is also decidedly incorrect.

Congress correctly understood that the decision to create a new work does not depend solely on the direct incentives provided for future works, but also on the existence of *present resources* to fund future creation. Fewer than ten percent of the members of the American Society of Composers, Authors, and Publishers earn their living full-time from their music, and many of those who do make under $10,000 a year. *See* 144 Cong. Rec. H1461-62 (Mar. 25, 1988). A copyright regime that fails to provide adequate compensation has "a chilling effect on the decision of our creators to continue to practice their craft." *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright per Program Licenses: Hearings Before the Subcomm. On Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 134 (1997) [1997 House Hearings].[8] By contrast, a regime that extends the term of existing copyrights "provide[s] additional income that would finance the production and publication of new works" by those with existing copyrights. 1995 House Hearings at 158 ("Peters statement").

The additional income provided by term extension also benefits larger institutional creators and publishers of copyrighted works. *See* 1995 House Hearings at 583 (letter from Professor Paul Goldstein, Stanford Law School) ("The great majority of motion pictures fail to repay their budgets and motion picture companies must rely on profits from block-

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[8] *See also* 1995 Senate Hearings at 44 (statement of Alan Menken) ("There comes a point in most people's lives when one must make a practical decision about the choice of a career. The continuing ability to provide for one's family both during and after one's lifetime would certainly be a factor. If it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try to make one's living as a creator.") *See generally CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61, 69 (2d Cir. 1994) (copyright enables authors to "earn a living from the creations that benefited the public").

busters and even medium successes to balance these losses. By increasing the value of their libraries overall, term extension can give them revenue to produce new films during the extension period."). Additional income enables institutional creators and publishers "to finance the production of marginal works and those involving greater risks," such as those by "young or emerging authors" or more "serious [works]" that are "less popular." S. Rep. No. 104-315, at 12-13; 1995 House Hearings at 196 (Peters statement). The term extensions in the CTEA thus facilitate the creation of original expression, both by individual authors and institutional creators and publishers. *See* 144 Cong. Rec. H1459, 1461 (March 25, 1988). "[T]he ultimate beneficiary is the public domain, which will be greatly enriched by the added influx of creative works over the long term." S. Rep. No. 104-315 at 12-13.

3. Preserving Existing Works.

Congress further concluded that extending the term of existing copyrights also promotes the progress of science by "providing enhanced economic incentives to preserve existing works," thereby enhancing the "long-term volume, vitality, and accessibility of the public domain." *Id.* at 3, 13. Extension is necessary given the high costs associated with the preservation of many works—most notably motion pictures:

> Because digital formatting enables the creation of perfect reproductions at little or no cost, there is a tremendous disincentive to investing the huge sums of money necessary to transfer these works to a digital format, absent some assurance of an adequate return on that investment. By extending the current copyright term for works that have not yet fallen into the public domain, including the term for works-made-for-hire (*e.g.*, motion pictures), the bill will create such an assurance.... More important, the American public will benefit from having these cultural treasures available in an easily reproducible and indelible format.

Id. at 13.[9]

Once again, petitioners' arguments to the contrary reflect nothing more than a basic policy disagreement. Petitioners point to the Brief of Hal Roach Studios & Michael Agee as Amici Curiae Supporting Petitioners ["Agee Brief"] to argue that the extension of copyright terms undermines restoration and preservation efforts. (Pet. Br. at 31-32.) The Agee Brief, however, supports Congress's judgment that the preservation and storage of deteriorating film is costly. *Id.* at 13. While the Agree Brief ultimately disagrees with Congress's determination of the best means to achieve that end, that disagreement only reinforces the point that this is a policy dispute, not a legal one.[10] Congress reasonably found that extending the terms of existing copyrights would promote progress by creating incentives to preserve existing works. There is no legal basis present here to disturb that decision.

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[9] *See also* 1995 House Hearings at 52 (statement of Jack Valenti) ("The quality of the print is soon degraded. And there is no one around who is going to invest the money for enhancement. Why? Because there is no longer a financial incentive to rehabilitate and preserve because it belongs to everybody and therefore it belongs to nobody. A public domain work is an orphan. . . . No one is responsible for its future life. But everyone exploits its use until that time certain when it becomes soiled and haggard and barren of all of its former virtues.").

[10] Allowing libraries to distribute or exhibit a work is unlikely to lead to the recoupment of the high preservation costs if everyone— including those who have made no investment—can freely distribute and exhibit the work. The Agee Brief's desire to vest rights in libraries and archives instead of the copyright owners is a policy decision best left to the discretion of Congress and certainly not mandated by the Constitution or the goal of "Progress."

4. Disseminating Existing Works.

The CTEA also promotes progress by facilitating the dissemination of existing copyrighted works. Congress concluded that term extensions of existing copyrights would create incentives for further distribution of original work. H.R. Rep. No. 105-452 at 4 (1998) (extending "copyright protection will be an incentive for U.S. authors [to] ... further disseminate them to the public"). That conclusion is well supported in the legislative record.

Disseminating a copyrighted work in a high-quality form requires considerable investment by a copyright holder. *See* 1995 House Hearings at 633 (joint statement of the Coalition of Creators and Copyright Owners) (the "costs of quality production, distribution and advertising, and changing technology, all require a major investment"). This is particularly true today, when a copyright holder seeks to make works available in the new media that have emerged in the digital era. *See id.* at 593 (letter from Shira Perlmutter, Catholic University of America). A copyright holder nearing the end of a copyright term may simply choose not to make the investment in disseminating original work in a high-quality form. *Id.*

Congress made the right policy decision. The "only products that do tend to be made available after a copyright expires are 'down and dirty' reproductions of such poor quality that they degrade the original copyrighted work." *Id.* at 602 (commentary by Arthur R. Miller). By contrast, the works of a copyright holder with an additional twenty years of protection "are far more likely to be made widely available to the public in a form the public wants to enjoy." *Id.* at 633. Congress had strong empirical support for reaching these conclusions. *Id.* at 212 (statement of Bruce A. Lehman discussing effect of NAFTA on older works). Progress is promoted when works are affirmatively brought "to the consumer who may enjoy it at a movie theater, at a home, in a car, or in a retail establishment." 144 Cong. Rec. H1458

(statement of Representative Coble). "Without that exploitation, a work may lie dormant, never to be discovered or enjoyed." *Id.*

5. Harmonization.

Petitioners minimize Congress's interest in "harmonizing" the copyright terms with those of the European Union, arguing that certain aspects of United States and European copyright law remain different, and that term extension exacerbates global disharmony. Pet. Br. at 42-43. Petitioners also argue that lowering the "transaction costs for commercial use of copyrighted work" in Europe, *id.* at 42, cannot justify the CTEA. But petitioners ignore a key rationale behind this legislation; "harmonizing U.S. copyright law to that of the European Union" ensures "the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works." S. Rep. No. 104-315, at 3.[11] Representative Conyers explained this important objective during the Congressional debate:

> [Term extension] will allow the United States to keep pace with the copyright terms of European countries.... The world loves American-made

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[11] The Court of Appeals agreed, concluding:

> The Act matches United States copyrights to the terms of copyrights granted by the European Union ... in an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits for the exploitation of copyrights. This is a powerful indication that the CTEA is a "necessary and proper" measure to meet contemporary circumstances . . . the force of that evidence is hardly diminished because, as the dissent correctly points out, the EU is not bound by the Copyright Clause of our Constitution.

Eldred, 239 F.3d at 379.

> music, movies, computer software and books. Creators of these works should not be placed at a competitive disadvantage in overseas markets. By acting on copyright extension, Congress will be furthering American innovation and protecting American jobs.

144 Cong. Rec. at H1465. As Representative Sensenbrenner recognized, that interest is satisfied by term extension, which "ensures that one of America's most valuable assets will continue to dominate in global markets." *Id.* at H9949 (Oct. 7, 1998).

Thanks in large part to strong copyright law, entire industries devoted to the creative process, consisting of individual authors, publishers, distributors, and partnerships, have emerged in the United States. *See* 144 Cong. Rec. at H9951 (copyright "products such as movies, software, music and books contributed more than $275 billion to the U.S. economy in 1996 and employed more than 6½ million workers"). Fostering these creative industries promotes the progress of science.

B. Petitioners' *Per Se* Rule Is Unsupported By The "Limited Times" And Originality Requirements.

Petitioners also erroneously claim that a *per se* rule against extensions of existing terms can be found in the "limited Times" and originality requirements of the Copyright Clause. Rather than repeat the many arguments of the government and other *amici* refuting this claim, *amici* will address three key reasons why petitioners are wrong.

First, the CTEA was not, as petitioners claim, an attempt to "evade [the limited Times] constitutional constraint." Pet. Br. at 10. Congress considered the risk of perpetual copyright, and recognized that the Constitution "clearly precludes Congress from granting unlimited protection for copyrighted works." S. Rep. No. 104-315 at 11; *see also* 1995 House

Hearings at 94 (Representative Berman). Congress expressly disclaimed any intention to take "a step down the road of perpetual copyright protection." S. Rep. No. 104-315 at 11. Rather, the CTEA was enacted to adhere to the "emerging international standard," which itself is not moving "toward perpetual protection, but to a fixed term of protection based on the death of the author." *Id.* Indeed, Congress explained that the driving principle behind the CTEA "remains unchanged" and limited—copyright should "protect the author and at least one generation of heirs." *Id.* The CTEA "merely modifies the length of protection in nominal terms" to better reflect this principle in light of "scientific and demographic changes." *Id.* There is no question, then, that the CTEA grants exclusive rights to authors "for limited Times," as the Constitution requires. *See* U.S. Const. art I. § 8.[12]

Second, the Framers rejected petitioners' view that copyright should be limited to a single "fixed" time, Pet. Br. at 17, and instead authorized Congress to establish copyright for "limited times." The notes of the debates from the Constitutional Convention indicate that the Framers rejected numerous constructions that would have limited copyright terms to "a limited time" or "certain time." James Madison, *Notes on Debates in the Federal Convention of 1787* (entry for August 18, 1787). James Madison proposed "To secure to literary authors their copy rights for a limited time." *Id.* Charles Pinckney suggested: "To secure to Authors exclusive rights for a certain time." *Id.* And Thomas Jefferson

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[12] "[L]imited" connotes "confine[ment] within limits" and a state of being "restricted in extent, number, or duration." *Webster's Third New Int'l Dictionary* 1312 (1993). To be limited, something must be "circumscribed within definite limits, bounded, [or] restricted." *The Compact Oxford English Dictionary* 966 (2d ed. 1999). Accordingly, Congress has the power to grant exclusive rights only for times that are "confine[d]" and "restricted in extent, number, or duration."

urged adoption of even more restrictive language: "Monopolies may be allowed to persons . . . for a term not exceeding—years but for no longer term & no other purpose." *5 Writings of Thomas Jefferson* 113 (Ford ed., 1985). The Framers, of course, rejected these alternatives, instead allowing Congress to protect rights for "limited times." The CTEA complies with this requirement.

Third, with regard to originality, the CTEA does not resurrect any works that have already entered the public domain; nor does it run afoul of this Court's decision in *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), that "facts" and "ideas" are not copyrightable. Petitioners may make use of any fact or idea contained in any work the CTEA protects. Nothing in *Feist*, however, prohibits Congress from adjusting the terms of existing copyrights in order to better promote the progress of science.

C. Petitioners' *Per Se* Rule Would Undermine Two Centuries Of Unbroken Constitutional Tradition Concerning Congress's Copyright Power.

Petitioners' *per se* argument, if accepted, would invalidate more than a dozen copyright extension acts adopted by Congress over the last two centuries, and would contradict the long-standing and well-established historical practice permitting Congress to readjust the terms of existing copyrights in order to respond to changing circumstances.[13] Petitioners' *per se* rule would even invalidate the original copyright statute adopted by the First Congress, the 1790 Act, which granted to "any other person or persons ... who hath or have purchased or legally acquired the copyright of any such map, chart, book or books" a *new* and exclusive fourteen-year copyright term, eligible for renewal if the copyright holder survived the term. Act of May 31, 1790, § 1, 1 Stat. 124 (1790).[14]

This Court, however, has made clear that "[t]he actions of the First Congress ... are [themselves] persuasive evidence of what the Constitution means." *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991). That petitioners' approach would *also* invalidate numerous similar Congressional enactments passed over the next two centuries is overwhelming evidence that it is in error:

> The construction placed upon the Constitution by the first act of 1790, and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great

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[13] *See* Copyright Act of 1976, Pub. L. No. 94-553, §§ 106–109, 301–304, 90 Stat. 2541 (1976) (extending the existing copyright term for twenty years); Act of December 31, 1974, Pub. L. No. 93-573, 88 Stat. 1873 (1974) (two-year retroactive extension); Act of October 25, 1972, Pub. L. No. 92-566, 86 Stat. 1181 (1972) (two-year retroactive extension); Act of November 24, 1971, Pub. L. No. 92-170, 85 Stat. 490 (1971) (one-year retroactive extension); Act of December 17, 1970, Pub. L. No. 91-555, 84 Stat. 1441 (1970) (one-year retroactive extension); Act of December 16, 1969, Pub. L. No. 91-147, 83 Stat. 360 (1969) (one-year retroactive extension); Act of July 23, 1968, Pub. L. No. 90-416, 82 Stat. 397 (1968) (one-year retroactive extension); Act of November 16, 1967, Pub. L. No. 90-141, 81 Stat. 464 (1967) (one-year retroactive extension); Act of August 28, 1965, Pub. L. No. 89-142, 79 Stat. 581 (1965) (two-year retroactive extension); Act of September 19, 1962, Pub. L. No. 87-668, 76 Stat. 555 (1962) (three-year retroactive extension); Act of March 4, 1909, § 24, 35 Stat. 1075, 1080-81 (1909) (up to fourteen-year retroactive extension authorized for certain works); Act of Feb. 3, 1831, 4 Stat. 436 (1831) (up to fourteen-year retroactive extension authorized for certain works); Act of May 31, 1790, 1 Stat. 124 (1790) (authorizing a fourteen-year term for all works, including those works already under existing copyright terms for up to seven years).

(footnote continues on next page)

[14] Prior to the 1790 Act, no federal copyright existed. Yet, granting new federal protections to those works previously protected under state copyright law would plainly violate petitioner's *per se* rule because Congress required no *quid pro quo* for the new federal protections, as petitioners' view would require.

> weight, and when it is remembered that the rights thus established have not been disputed during a period of [over two centuries], it is almost conclusive.

Burrows-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884).

Petitioners try to discount the significance of the 1790 Act as an aberration that "stands for nothing more than the need of the First Congress to address fundamental issues of transition from a state federation to a national government." Pet. Br. at 29. But petitioners fail to explain why Congress should not be allowed to address other significant changes affecting copyright, such as those involving demographics, commerce, and technology. Moreover, petitioners' argument that the federal grant under the 1790 Act can "be understood as a *compensation* for the expected displacement of a state-protected right," *id.*, does not change the fact that the first Congress *extended* the copyright for works that were already in existence (as opposed to simply replicating the remaining state-law terms). Thus, petitioners effectively confirm Congress's authority to adjust the duration of existing copyrights in order to promote a broad range of purposes.

In any event, there is nothing in the legislative history of the 1790 Act indicating that Congress was granting itself a one-time-only exemption to readjust the scope and duration of existing copyrights—or that the Constitution created such a distinction—and the practices of other early Congresses suggest the contrary. Those Congresses recognized their continuing authority to readjust copyrights and patents in order to meet the ends of Article I, § 8. *See generally* Brief *Amici Curiae* of Tyler T. Ochoa In Support of Petitioners at 22-24 (early Congresses understood that they could extend

patent and copyright terms for "equitable" and "utilitarian" reasons).[15]

Finally, even if the acts of early Congresses had not made the Framers' intent so clear, interpreting the Copyright Clause to require a fixed term that can never be changed would provide a meaningless limit on Congress's power. Under petitioners' view, Congress could not extend existing copyrights for even a day; at the same time, Congress could set a one-time term of 500 years, as long as the term established were never changed. Such an inflexible view is contrary to the purposes of the Copyright Clause and would place a constitutional straightjacket on future Congresses, making them powerless to prevent any further decay in the strength of copyright law.

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[15] Other examples include Congress's action, in 1808, to extend by private act the term of a patent owned by Oliver Evans. *See* An Act for the Relief of Oliver Evans, ch. 13, 6 Stat. 70 (1808). Similarly, in 1828, Congress extended the copyright of James Rowlett. *See* An Act to Continue the Copy-Right to John Rowlett, ch. 145, 6 Stat. 389 (1828). In 1831, Congress extended the existing copyright term to twenty-eight years "from the time of recording the title thereof," and allowed surviving widows or children of deceased authors to renew the term for an additional fourteen years. Act of Feb. 3, 1831, §§ 1, 2, 4 Stat. at 436-37. And in 1836, Congress permitted *existing* patent-holders to follow a specified procedure in seeking to extend the length of a patent term by seven years. *See* Act of July 4, 1836, ch. 357, §§ 5 & 18, 5 Stat. 117, 117, 124-25 (1836). *Cf.* Tyler T. Ochoa, *Patent and Copyright Term Extensions and the Constitution: A Historical Perspective*, 49 J. Copyright Soc'y USA 19, 124-25 (2001) (the view that "retroactive term extension is absolutely forbidden" has "appealing simplicity," but "is difficult to maintain in light of the long history of patent term extensions which were upheld in the mid-nineteenth century").

III. CONGRESS'S EXERCISE OF ITS COPYRIGHT POWER TO EXTEND THE TERM OF EXISTING WORKS DOES NOT INVOKE HEIGHTENED SCRUTINY UNDER THE FIRST AMENDMENT.

Petitioners also challenge the CTEA on the ground that it violates the First Amendment, Pet. Br. at 33-47, arguing that it, "like all regulation that allocates the right to speak," is subject to intermediate scrutiny under the standard set forth in *Turner Broadcasting Systems v. FCC*, 520 U.S. 180 (1997)—and that the CTEA fails this test. *Id.* at 39. While petitioners only directly challenge the constitutionality of the CTEA's term extension of existing copyright, their argument for the application of intermediate scrutiny would also apply to Congress's prospective protections of copyrights, and to all other copyright laws—past, present, and future. *See id.* at 38-39. This position cannot be squared with the historic exercise of Congress's power under the Copyright Clause, the First Amendment, or the decisions of this Court related to both constitutional provisions.

Copyright statutes such as the CTEA are not, of course, immune from all First Amendment considerations. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), this Court held that core exercises of Congress's copyright power "strike[] a definitional balance" with the First Amendment. 471 U.S. at 556 (citation quotations omitted). For example, this Court has held that copyright may not legally protect "ideas," but only the "form of expression." *See N.Y. Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring). Copyright laws must also permit "fair use" of works that are not in the public domain. *Harper & Row*, 471 U.S. at 560. Copyright's protections—and the limitations on those protections—thus combine to "assure[] authors the right to their original expression, but encourage[] others to build freely upon the ideas and information conveyed in a work," promoting the "ends" of the Copyright Clause. *Feist Publ'ns., Inc.*, 499 U.S. at 349-50.

Given these limitations, *amici* certainly agree with petitioners that Congress could not eliminate the idea/expression dichotomy or the fair use doctrine. Pet. Br. at 35. *Amici* also agree that a content-based copyright act would not be immune from constitutional attack. *Id.* But the fact that some exercises of Congress's power under the Copyright Clause might, in some circumstances, violate speech-protection principles is no reason to apply heightened scrutiny to all exercises of Congress's power under that Clause.

In this case, the CTEA is *not* content based, and does *not* eliminate the idea/expression dichotomy or the fair use doctrine. Thus, there is no basis for the judicial intervention that heightened scrutiny would entail. Rather, because the CTEA is a core exercise of Congress's copyright power, reflecting a neutral policy choice by Congress regarding the appropriate duration of copyright, it should be considered a policy choice the Framers entrusted to Congress.

Thus, in enacting the CTEA, Congress plainly struck the "definitional balance" between the Copyright Clause and the First Amendment that this Court set forth in *Harper & Row*. Congress left intact the provisions of the Copyright Act of 1976, ensuring that only "original" expression is protected, *see* 17 U.S.C. § 102(a), and that the ideas and facts underlying that original expression remain in the public domain, *see id.* § 102(b), so that persons wishing to exploit unoriginal works, ideas, or facts may do so. Congress also kept intact the Copyright Act's provision ensuring that even original expression is subject to "fair" uses, *see id.* § 107, so that persons wishing to make fair use of protected original expression may do so. Petitioners may thus use the ideas contained in works protected by the CTEA, and may make "fair" uses of expression that is otherwise protected by the CTEA. As a result, petitioners cannot offer any reason to deem the CTEA

as less than fully protective of their First Amendment rights under *Harper & Row*.[16]

Instead, petitioners argue that "copyright law may be upheld against First Amendment challenge insofar—but only insofar—as it protects an 'engine of free expression,'" Pet Br. at 36-37 (quoting *Harper & Row*, 471 U.S. at 558), and that copyright law should be invalidated under the First Amendment if its restrictions "merely inhibit access to ideas without any countervailing benefit," *id.* at 37 (quoting *Sony*, 464 U.S. at 450-51). Petitioners' contention misapprehends the nature of Congress's power under the Copyright Clause, and this Court's precedents about how that power comports with the First Amendment's protections.

As an initial matter, the claim for heightened scrutiny proceeds from premises that are inapposite in the context of a copyright term extension—or of copyright itself. Thus, relying on *Turner*, petitioners contend that the CTEA can

[16] According to petitioners, *Harper & Row* does not apply to facial challenges to copyright statutes—but this notion has no support in *Harper & Row* or any subsequent case of this Court. Petitioners agree that the Court in *Harper & Row* "properly rejected The Nation's argument" that "it had a First Amendment right to trespass on Harper & Row's exclusive right." Pet. Br. at 34. But that conclusion was based on the definitional balance the Copyright Act of 1976 struck with the First Amendment, *see* 471 U.S. at 556 & 560, not on the particular method by which The Nation challenged that definitional balance. Under petitioners' view, if they—instead of filing this lawsuit—had simply republished works uniquely protected by the CTEA, they would have had no subsequent First Amendment defense to a claim of infringement. But petitioners fail to explain why *any* of the First Amendment interests they assert here would apply any less to Eldred-the-infringer (asserting a First Amendment right to copy expression protected by the CTEA) than to Eldred-the-challenger (also asserting a First Amendment right to copy expression protected by the CTEA). Such arbitrary line drawing finds no support in the First Amendment. It is the substance of the copyright protection that matters—not how a challenge is framed.

"withstand First Amendment review only … if it advances important governmental interests unrelated to the suppression of free speech." Pet. Br. at 39. But, of course, copyright itself inherently advances an important governmental interest—the promotion of progress—by means of restricting some speech: *i.e.*, the unauthorized copying of protected works. Thus, contrary to petitioners' contentions, allocations of copyright are not "wholly foreign to the First Amendment," Pet. Br. at 41 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)), or "mere assertion[s] of dysfunction or failure in a speech market," *id.* at 39 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640 (1994)). Rather, they reflect a choice made by the Framers and enshrined in the Copyright Clause of the Constitution. By stimulating the creation of "useful works for the general public good," *Harper & Row*, 471 U.S. at 558 (quoting *Aiken*, 422 U.S. at 156), copyright "itself" is an "engine of free expression." *Id.*

Second, applying *Turner* here would require this Court to second-guess all Congressional enactments affecting the scope and duration of copyright, in direct contravention of countless decisions of this Court repeatedly affirming that such decisions vest in Congress. *See, e.g., Fox Film Corp.*, 286 U.S. at 127; *Sony*, 464 U.S. at 431; *Pennock*, 27 U.S. at 17; *Diamond*, 447 U.S. at 317; *Parker*, 437 U.S. at 595; *Deepsouth Packing*, 406 U.S. at 529-30; *Stewart*, 495 U.S. at 228; *Bonito Boats, Inc.*, 489 U.S. at 168. There is no better example of the problematic nature of transferring such decision-making to the courts than the issues posed in a situation such as this, where Congress—relying on the sort of information and weighing the sort of factors best considered by the legislative branch—made the decision to extend copyright terms for the variety of reasons discussed in Section II, *supra*. This balancing must "be left to Congress," because it is "beyond the competence" of the courts. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 413-14 & n.15 (1974).

Finally, petitioners argue that *Turner* scrutiny is appropriate because the expansion of copyright protection over time, along with changes in technology, have given copyright owners increased rights to control access to their work. Pet. Br. at 38. But the expansion of copyright protection reflects both the deference this Court properly affords Congress and Congress's consistent responsiveness to commercial, demographic, and technological changes in crafting copyright law. That expansion has created not a threat, but "an engine of free expression." Indeed, the emerging threat to creative expression is not Congressional protection of copyright in new media like the Internet, but the absence of those protections, given the low-cost, high-dose infringement that can occur via the Internet.

In the end, petitioners' contention that *Turner* should apply to the CTEA falls of its own weight.[17] Absent extreme cases, there are no judicially manageable standards to replace

[17] Even if *Turner* applied to core exercises of Congress's copyright power like the CTEA, the CTEA would still satisfy intermediate scrutiny. The overriding government interest here is Congress's desire to create "Progress" under Article I, § 8, an interest embedded in the Constitution. The only questions under *Turner* are whether the CTEA furthers the interests of Article I, § 8, and whether, in so doing, the CTEA burdens substantially more speech than necessary. *See Turner Broad. Sys.*, 512 U.S. at 662. Petitioners aptly frame the issue: "Such an incentive to create [more speech] could qualify as an 'important government interest' *if* Congress could reasonably have believed that the restriction it imposed through the CTEA's retroactive copyright extensions actually advanced the incentive to create." Pet. Br. at 41. As we explain above, Congress could—and did—reasonably believe that extensions of existing copyright create incentives for more speech.

Ultimately, there can be no denying that Congress drafted the CTEA with care and precision. It did not pick a twenty-year extension from a hat: rather, it pegged that extension to changes in life expectancy, commercial circumstances, and evolving international norms. No narrower legislation could have accomplished Congress's goals.

Congress's judgments regarding the economic, social, demographic and technological factors that have led it to extend copyright terms throughout history, and in many instances to make those extensions applicable to existing works. Moreover, such heightened scrutiny is unnecessary given the speech-protecting principles found in copyright law itself, *see, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 n.5 (1994), such as the idea/expression dichotomy and fair use doctrine. Treating copyright legislation like "all other regulation" under *Turner* ignores the presence of these built-in limitations and protections in Copyright Clause jurisprudence, and is at odds with this Court's holding in *Harper & Row*.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the D.C. Circuit should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

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Petitioners,

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMICUS CURIAE MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF THE MPAA

The Motion Picture Association of America, Inc. ("MPAA") is a non-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The MPAA's seven members produce or distribute approximately ninety percent of the filmed entertainment in the domestic theatrical, television, and home video markets, and they are among the leading producers and distributors of motion pictures overseas. Each MPAA member company owns thousands of valuable copyrights.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution gives Congress the power to create a federal copyright system, and to determine for what "limited Times" the law will afford to "Authors . . . the exclusive Right to their . . . Writings[.]" U.S. Const. Art. I, § 8, cl. 8. Beginning in 1790, each time Congress has set the term of federal copyrights, it has changed the term for existing as well as for new works. It followed that established practice again in 1998, in the Sonny Bono Copyright Term Extension Act ("CTEA").

Throughout the legislative and judicial consideration of the CTEA, special focus has been placed on what effect extending existing terms would have on films. Congress heard arguments on both sides of that issue, and resolved them in favor of term extension. In rejecting petitioners' challenge to the Act, the court of appeals referred (Pet. App. 12a) to Congress's finding that "extending the duration of copyrights on existing works would . . . give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration." In this Court, petitioners and their amici spe-

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[1] No counsel for a party authored any part of this brief. No person or entity other than the MPAA, its members, and their counsel made a monetary contribution to the preparation or submission of this brief. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

cifically dispute (Pet. Br. 32, 44-45) the accuracy and relevance of Congress's conclusions with respect to films. As representative of the world's largest producers and distributors of audiovisual works, and the principal owners of U.S. copyrights in such works, the MPAA offers the Court a real-world perspective on these issues.

Petitioners' arguments are both doctrinally and empirically ill founded. Doctrinally, petitioners' reading of the "limited Times" provision is unpersuasive. It is also inconsistent both with this Court's traditionally broad construction of the Copyright Clause and with Congress's consistent practice since the time of the Founders. There is, moreover, no warrant for petitioners' effort to convert the sweeping purpose of the Copyright Clause, "[t]o promote the Progress of Science," into a test for every detail of each statutory adjustment to the overall balance of the copyright system, or to confine its meaning to the single goal of establishing incentives for the creation of new works. The "Progress of Science" is as surely promoted by establishing a balanced structure of rights and exceptions that can respond flexibly to changed circumstances in the United States and abroad, and by providing incentives for the preservation, restoration, or distribution of existing works, as it is by promoting the creation of new works.

Empirically, the legislative record and the film industry's experience support the reasonableness of Congress's conclusion that the CTEA would serve these goals. For example, many films are chemically fragile and expensive to preserve and restore. Extended copyright terms give existing copyright holders the incentive to bear those expenses, and then to promote wide distribution of the works in order to recoup their investment. Petitioners contest these propositions, but their protests simply make clear that the essence of their argument is not about the meaning of the Constitution, but about which copyright policy will better "promote the Progress of Science." That sort of policy argument, dependent as it is on uncertain empirical judgments about both domestic and international markets, is paradigmatically one to be resolved by Congress, not the courts.

Indeed, recognizing the ordinary limits of judicial review, petitioners seek to couch much of their argument in the language of heightened First Amendment scrutiny. This Court's cases, however, have never suggested a position remotely as sweeping as that advanced by petitioners, which would subject every congressional decision concerning the scope of copyright protection to extensive constitutional litigation. Copyright law restricts the exploitation of expression, not the dissemination of ideas, and itself serves to advance—not threaten—First Amendment values.

ARGUMENT

I. THE CTEA'S UNIFORM EXTENSION OF COPYRIGHT TERMS IS A PERMISSIBLE EXERCISE OF CONGRESS'S POWER UNDER THE COPYRIGHT CLAUSE, AS ITS APPLICATION TO FILMS MAKES CLEAR.

"As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product." *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Judgments of this sort, including judgments about the appropriate duration of the copyright term, require balancing disparate interests and making predictions about future behavior. These factually complex, predictive determinations are precisely the sort that legislatures are most competent to make, and to which courts should defer once the legislature has decided.[2] Accordingly, "[w]ithin the limits of the constitutional grant" of the Copyright Clause, the Framers left it to Congress to "select[ ] the

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[2] *See, e.g.*, *Pegram* v. *Herdrich*, 530 U.S. 211, 221-22 (2000); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985).

policy which *in its judgment* best effectuates the constitutional aim." *Graham* v. *John Deere Co.*, 383 U.S. 1, 6 (1966) (emphasis added).[3]

In light of these principles, petitioners concede, as they must, that whether the particular term of copyright protection adopted by Congress in the CTEA is too long or too short is "not a judgment meet for this Court." Pet. Br. 14. They argue, however, that Congress's concomitant decision to extend the same term of protection to subsisting works falls outside the range of Congress's discretion under the Copyright Clause. That argument finds no support in the text or purpose of the Clause, and defies over 200 years of history. Petitioners' reasoning, moreover, could call into question any expansion of rights that applies to subsisting works. As a result, petitioners' contention that Congress has no discretion to apply changes in the copyright laws to subsisting works would invite a deluge of litigation regarding both prior term extensions and prior modifications to the entire range of rules and doctrines applicable to copyrights.[4]

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[3] *Cf. Stewart* v. *Abend*, 495 U.S. 207, 230 (1990) ("This evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to 'secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings.' . . . [I]t is not our role to alter the delicate balance Congress has labored to achieve."); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989) ("It is for Congress to determine if the present system of . . . patents is ineffectual in promoting the useful arts . . . .").

[4] Each such challenge would likely require resolution of unique constitutional issues and engender ongoing uncertainty about the scope of copyright protection. Such a constitutionalization of copyright law would, among other things, require resolution of whether particular copyright provisions could stand under the Copyright Clause, the Commerce Clause, the Treaty Power, and other constitutional provisions.

A. The Text Of The Copyright Clause And The History Of Congress's Exercise Of The Copyright Power Show That Congress May Constitutionally Extend A New Copyright Term To Subsisting Works.

The Constitution confers on Congress the "Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, cl. 8. That language both grants power and defines the limits of the grant. Copyrights may only be granted to "Authors," with respect to "Writings," and for "limited Times." But this Court has always read those textual limits expansively, in light of the broad purpose of the Clause and in recognition that it is part of "the great repository of the powers of congress." *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 56 (1884). As the Court explained in *Goldstein* v. *California*, 412 U.S. 546, 561 (1973), for example, the terms "Authors" and "Writings" have been construed "not . . . in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles." Thus, "Authors" has been held to include any person "to whom anything owes its origin; originator; maker," *Burrow-Giles*, 111 U.S. at 58, including cartographers, artists, composers, and photographers. *See* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.06[B] (2002). Similarly, "Writings" may include not only "script or printed material," but also "any physical rendering of the fruits of creative intellectual or aesthetic labor," *Goldstein*, 412 U.S. at 561, including sculptures and architectural works.

1. Extending the copyright term for subsisting works does not violate the "limited Times" requirement.

Petitioners argue that application of a new copyright term to subsisting works violates the "limited Times" restric-

tion. They concede, however (Br. 13-14), that the term set by the CTEA as it applies to *new* works cannot be challenged on the ground that it is not "limited"; and they are unable to explain why, if that is so, the very same term is not properly "limited" when applied to *subsisting* works. Petitioners would read the Clause as though it permitted grants only for periods that may not be changed once they have begun to run. But that restriction finds no basis in the language the Framers used. *Cf. McClurg* v. *Kingsland*, 42 U.S. 202, 206 (1843) ("[T]he power[ ] of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and as there are no restraints upon its exercise, there can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents."). As the court of appeals observed (Pet. App. 12a-13a), "nothing in text or in history . . . suggests that a term of years for copyright is not a 'limited Time' if it may later be extended for another 'limited Time.'" Even if it were possible that a number of successive extensions might yield a total term that, in effect, confers a perpetual copyright, the overall term set by the CTEA does not approach that limit, as petitioners concede (Br. 13-14).

2. Congress's consistent practice, from the First Congress on, confirms its power to extend a new term to subsisting works.

Petitioners' cramped construction of the Clause is inconsistent not only with this Court's approach, but also with the long history of copyright legislation. The first English copyright statute granting rights to authors, the Statute of Anne of 1710, 8 Anne, c. 19, provided protection not only for new works, *id.* §§ 1, 3, but also for "books already printed," *id.* § 1. *See generally* 1 William Patry, *Copyright Law and Practice* 11 (1994). When twelve of the thirteen new American state legislatures passed copyright statutes in the early 1780s, they looked to the Statute of Anne as a model, *id.* at 19-20, and all

of them extended copyright protection to some category of subsisting works.[5]

Congress first exercised the new federal copyright power in 1790, with principal revisions in 1831, 1909, and 1976.[6] Each of those Acts defined particular "limited Times" for which copyrights would be granted for particular categories of works, and each applied the new term to both new and subsisting copyrights.[7] That consistent practice, starting in the time of the Framers, is entitled to great weight in assessing petitioners' novel constitutional argument. *See, e.g.*, *Burrow-Giles*, 111 U.S. at 57.[8]

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[5] Six of those statutes gave copyright protection to subsisting works that had already been printed or published. *See* Copyright Acts of Massachusetts (Mar. 17, 1783), New Hampshire (Nov. 7, 1783), Rhode Island (Dec. 1783), South Carolina (Mar. 26, 1784), Virginia (Oct. 1785), New York (Apr. 29, 1786). All of them gave protection to existing works that had not yet been printed. The texts of all of the early state statutes can be found in Library of Congress, Copyright Office, Copyright Enactments 1-21 (1963).

[6] *See* Act of May 31, 1790, 1 Stat. 124; Act of Feb. 3, 1831, 4 Stat. 436; Act of March 4, 1909, 35 Stat. 1075; Copyright Act of 1976, 90 Stat. 2541.

[7] *See* Act of May 31, 1790, § 1, 1 Stat. 124, 124; Act of Feb. 3, 1831, § 16, 4 Stat. 436, 439; Act of March 4, 1909, § 24, 35 Stat. 1075, 1085; Copyright Act of 1976, § 304, 90 Stat. 2541, 2573. Because the 1976 Act shifted the method of calculating the copyright term from fixed renewable terms to a single term based on the life of the author, it could not apply exactly the same term to all subsisting works as it applied to future works. Congress, though, sought to approximate equal terms for future and subsisting works by extending the term of protection for works that were still in either their initial 28-year term or their renewal term under the 1909 Act to a total of 75 years. *See* H.R. Rep. No. 94-1476, at 135 (1976); *see generally* Paul Goldstein, *Copyright* §§ 4.7-4.8 (2d ed. 2002).

[8] Petitioners argue (Br. 30) that the 1790 legislation addressed "fundamental issues of transition," but they fail to identify any source of congressional power for such a "transition rule" other than the Copyright Clause itself.

3. Extending a new term to subsisting works "promote[s] the Progress of Science."

In pressing their new reading of the Copyright Clause, petitioners place considerable emphasis on the Clause's introductory language—"To promote the Progress of Science and Useful Arts." That phrase is perhaps most naturally read as expressing the judgment of the Framers that having a federal copyright system *would* "promote the Progress of Science." Understood in that way, the introductory language imposes no independent limit on the power granted in the remainder of the Clause—it simply explains why the Framers granted Congress that power.[9] In any event, there is no question that "promot[ing] the Progress of Science" expresses the broad purpose of the grant of power[10]—and the grant should, like any constitutional provision, be construed to give Congress wide discretion to fulfill its purpose.

Petitioners would confine that purpose to a single goal: the establishment of incentives for the creation of new works. The CTEA in fact serves that purpose because, as discussed below, Congress could reasonably conclude that enabling copyright holders to gain the funds necessary to finance new works (including by increased revenues from overseas) is an important way of promoting the creation of new works. But the limitation petitioners suggest is not a tenable reading of the broad terms the Framers chose. "Science," in this context, means the whole of human knowledge.[11] Thus, any

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[9] *See generally* 1 *Nimmer on Copyright* § 1.03[A] (2002) ("Therefore, the phrase 'To promote the progress of science and useful arts . . . .' must be read as largely in the nature of a preamble, indicating the purpose of the power but not in limitation of its exercise."); *cf. Jacobson* v. *Massachusetts*, 197 U.S. 11, 22 (1905) (preamble of the Constitution).

[10] *See, e.g.*, *Goldstein*, 412 U.S. at 555 (clause "thus describes both the objective which Congress may seek and the means to achieve it").

[11] Samuel Johnson, *A Dictionary of the English Language* (1755) ("1. Knowledge . . . 3. Art attained by precepts or built on principles. . . . 4. Any art or species of knowledge.").

measure "promote[s] the Progress of Science" so long as Congress could rationally conclude that it contributes to the enrichment of knowledge.

The advancement of knowledge through copyright cannot reasonably be understood to be achieved only through the creation of new works. First, as this Court has recognized, from the beginning of the federal copyright system, creating incentives to publish and thus disseminate works has been a core function of copyright. *See, e.g.*, *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 558 (1985) ("copyright supplies the economic incentive to create *and disseminate* ideas" (emphasis added)). Indeed, before the 1976 revision, most of the federal copyright statute applied only to published works. That restriction, and the incentive for authors to publish that it embodied, powerfully demonstrates Congress's longstanding recognition that dissemination of works by itself "promotes the Progress of Science." In many cases such dissemination will not happen without economic incentives to restore and market the work, as the experience of the film industry illustrates.

Second, as the court of appeals observed (Pet. App. 13a), "[p]reserving access to works that would otherwise disappear—not enter the public domain but disappear—'promotes Progress' as surely as does stimulating the creation of new works." Petitioners suggest that every film freed from copyright protection is a film permanently gained for the public domain. In fact, because of film's chemical fragility, active preservation efforts are needed to keep many old films from vanishing altogether. Third, because older works often supply the inspiration for the creation of new works, preservation and distribution serve an essential role in the very innovation that petitioners insist Congress must promote.[12]

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[12] Petitioners contend (Br. 20-21, 32-33, 44-45) that, even if preservation and dissemination promote the "Progress of Science," they cannot support extending the copyright term of existing works because preservation and dissemination do not themselves satisfy the originality re-

Congress may use the copyright power to "promote the Progress of Science," then, by enabling authors to gain the financing essential to the production of new works, by encouraging the preservation of works that would otherwise be lost, by spurring the wide distribution of existing works, or by enhancing the United States' position in the international copyright regime. As shown below, with reference to the CTEA's effects on films, Congress acted well within its discretion in concluding that the CTEA's extension of the copyright term for subsisting works would in fact "promote the Progress of Science" in each of these ways.

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quirement recognized in cases such as *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991). Petitioners misconstrue that requirement. They argue (Br. 20) that the originality requirement is not premised on the "words 'Authors' and 'Writings' alone," and thus applies even when the copyright holder is indisputably the "Author" of the "Writing" at issue. Yet *Feist* made clear that it is precisely the terms "Authors" and "Writings" that "presuppose a degree of originality." 499 U.S. at 346. Subsisting works would not be eligible for extension if they had not *already satisfied* the originality requirement. But nothing in *Feist* or other cases suggests that subsisting works lose their status as "Writings" of "Authors" once they are initially published. Nor does any case suggest that each decision Congress makes in exercising the copyright power, including any alteration to the scope or duration of protection during the term of the original grant, must itself somehow promote the creation of new, original works.

Petitioners' reliance on *Graham* v. *John Deere Co.*, 383 U.S. 1 (1963), fares no better. Dictum in *Graham* states that Congress may not "authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict the free access to materials already available." 383 U.S. at 6. Even if that reasoning could be extended generally to copyrights, it would have no application in this case, since the CTEA does not affect works that have already entered the public domain.

B. The Experience Of The Film Industry Supports Congress's Conclusion That Applying The CTEA's Term Extension To Existing Works Would "Promote The Progress Of Science."

1. Congress reasonably found that the CTEA would spur the creation of new works.

Petitioners seem to acknowledge (Br. 41-42) that spurring the creation of new works, including by supplying essential financing, constitutes a legitimate basis for the exercise of Congress's power. They simply deny that the CTEA's term extension has such an effect.

Congress, however, expressly found to the contrary, and evidence both within and outside the legislative record demonstrates the reasonableness of that judgment. The Senate report on the CTEA states that "extended protection for existing works will provide added income with which to subsidize the creation of new works." S. Rep. No. 104-315, at 12 (1996). Such subsidization, the report explains, is "particularly important in the case of corporate copyright owners, such as motion picture studios and publishers, who rely on the income from enduring works to finance the production of marginal works and those involving greater risks (*i.e.*, works by young or emerging authors). . . . [T]he ultimate beneficiary is the public domain, which will be greatly enriched by the added influx of creative works over the long term." *Id.* at 12-13.

Congress's judgment that term extension promotes the creation of new works through helping to fund those works rested in part on the advice given to Congress by the country's leading copyright officials. Register of Copyrights Marybeth Peters, for example, suggested that extension of the copyright term for subsisting works "could . . . provide additional income that would finance the production and distribu-

tion of new works,"[13] and she gave an old but compelling example. "Authors would not be able to continue to create," she explained, "unless they earned income on their finished works. The public benefits not only from an author's original work but also from his or her further creations. Although this truism may be illustrated in many ways, one of the best examples is Noah Webster[,] who supported his entire family from the earnings on his speller and grammar during the twenty years he took to complete his dictionary."[14] Bruce Lehman, then Commissioner of Patents and Trademarks, made the same case with special reference to the "commercial copyright-based industries," which, he noted, would gain from term extension the "considerable financial resources" often essential to making and marketing new products such as movies.[15]

The movie industry illustrates with particular force the importance of revenues from subsisting works in financing, and thus enabling the creation of, new works. The average cost of making a new feature film has reached well over $50 million, and marketing costs add another $25 million.[16] Moreover, revenues from new films are highly uncertain, with headline-grabbing hits often outnumbered by money-losing projects.[17] Cash flows from the re-release of titles

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[13] *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 104th Cong. 158 (1995) ("*1995 House Hearings*").

[14] *Id.* at 165; *see id.* at 196; *see also id.* at 109 (Directors Guild of America), 583 (Prof. Paul Goldstein).

[15] *Id.* at 212; *see also In the Matter of Duration of Copyright Term of Protection*, Docket No. 93-8 (United States Copyright Office 1993) at 75 (Bernard Sorkin) ("1993 Copyright Office Hearing").

[16] *See* Harold L. Vogel, *Entertainment Industry Economics* 80 (5th ed. 2001).

[17] *See, e.g., id.* at 35 ("In fact, of any ten major theatrical films produced, on average, six or seven may be broadly characterized as unprofitable.").

from studio libraries, whether in theaters, on television, or on videocassettes and digital versatile discs ("DVDs"), thus play a crucial role in financing new works.[18]

Congress also reasonably found that term extension would promote the creation of new works by spurring the production of derivative works such as remakes and sequels. The Senate report on the CTEA noted term extension's likely boost to production of derivative works, *see* S. Rep. No. 104-315, at 12, and a number of witnesses supported that judgment.[19] The economic logic behind it is straightforward. Copyright owners—notably film studios—are unlikely to make the large investments required to produce derivative works, such as new editions of old works that include supplemental material such as never-before-seen outtakes and interviews, if the remaining copyright term on the underlying work is insufficient to assure them of the continued exclusive right to profit from works building on the underlying work.[20]

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[18] Amici George Akerlof et al. suggest (Br. 8-9 & n.14), without documentation, that cash flows should not affect decisions to invest in creation of new works. Whatever the merits of amici's argument *as theory*, "[a] large literature in corporate finance and macroeconomics documents the relationship between liquidity and investment." Owen Lamont, *Cash Flow and Investment: Evidence from Internal Capital Markets*, 52 J. Fin. 83, 84 (1997). A "strong correlation between cash (whether measured as a flow, a stock, or both) and investment is a well-documented fact." *Id.*; *see generally* John R. Meyer & Edwin Kuh, *The Investment Decision: An Empirical Study* (1957); Steven M. Fazzari et al., *Financing Constraints and Corporate Investment*, Brookings Papers on Economic Activity 1 1988, 141 (1988); S. Gilchrist et al., *Evidence on the Role of Cash Flow for Investment*, 36 J. Monetary Econ. 541 (1995).

[19] *See 1995 House Hearings* at 141-42 (Judith Saffer), 582-83 (Prof. Paul Goldstein), 600-01 (Prof. Shira Perlmutter); *see also* 1993 Copyright Office Hearing at 38 (Susan Mann).

[20] The recently released 50th anniversary DVD of "Citizen Kane" (1941) serves as one example of such works. In addition to a painstakingly restored version of the film, the two-DVD set includes newsreel footage of the film's New York premiere, a 1996 documentary on the controversy it caused when it was first released, and running commentary

Petitioners may take issue with this logic, but predictive economic judgments of this sort are properly left to Congress.

2. Congress reasonably found that uniform term extension would also encourage the preservation, restoration, or wider distribution of existing works, notably older films.

The House Report on the CTEA expressly states that term extension would, among other things, "provide copyright owners generally with the incentive to restore older works and further disseminate them to the public." H.R. Rep. No. 105-452, at 4 (1998). The Senate report similarly notes that term extension would "provide enhanced economic incentives to preserve existing works." S. Rep. No. 104-315, at 3; *see also id.* at 13. As Senator Hatch stated at a 1995 hearing on the CTEA, "[o]wnership of a work includes the incentive to exploit a work, and with that incentive goes the incentive to preserve the work in a high quality form."[21] The experience of the film industry confirms the reasonableness of that legislative judgment.

Three considerations make those incentives particularly important in the film industry. Films are chemically fragile; they are very costly to preserve and restore; and yet they have the potential—particularly because of recent technologies such as cable television, videocassettes, and DVDs—to remain commercially valuable for many decades after they were originally released. The first two of those considerations explain why an economic incentive is important to ensuring the preservation of many movies: preventing films from being lost forever and maintaining film quality cost a

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by director Peter Bogdanovich and film critic Roger Ebert. *See, e.g.*, Tom Shales, *Raising "Kane": A DVD-luxe Model, Classic Films Get Special Treatment*, Wash. Post, Oct. 21, 2001, at G1. Copies of the DVD have been lodged with the Court.

[21] *Copyright Term Extension Act of 1995: Hearing Before the Senate Judiciary Comm.*, 104th Cong. 3 (1995) ("*1995 Senate Hearing*").

great deal. The third explains why copyright term extension supplies an effective incentive, particularly for older films: term extension enables the owners of those films to release them through the new modes of distribution and thus recoup the money needed for their preservation and restoration.

a. *Films are fragile.*[22] Until 1950, films in the United States were made on nitrocellulose, which is both volatile and subject to relatively rapid chemical deterioration at room temperature. Largely because of that instability, more than half of the feature films produced in the United States before 1950 have been lost. In 1950, film makers switched to an acetate-based film popularly known as "safety film" because it lacks nitrate film's flammability, but safety film has proven to suffer from its own forms of deterioration and fading.

The loss of so many old films helps demonstrate the very point that petitioners deny: commercial incentives—incentives made possible by extended copyright terms—are an essential engine for film preservation. If, before the last few decades, the studios—like virtually all film makers and distributors—did not invest substantial sums in preservation, that failure was due in significant part to the absence of an economic incentive to do so. With the emergence of cable television and home video, and the extension of copyright terms to a length enabling old movies to be re-released profitably in those new media, studios have started to devote millions of dollars each year to preservation and restoration. As one study of lost films notes: "It may be dollars and cents to

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[22] The representations in this paragraph rest on Anthony Slide, *Nitrate Won't Wait: A History of Film Preservation in the United States* 1-5 (repr. ed. 2000); Library of Congress, *Redefining Film Preservation: A National Plan: Recommendations of the Librarian of Congress in Consultation with the National Film Preservation Board* 1, 3 (1994) ("*1994 Librarian of Congress Report*"); Library of Congress, *Film Preservation 1993: A Study of the Current State of American Film Preservation, Vol. 1: Report* 2-3, 7-15 (1993) ("*1993 Librarian of Congress Report*"); *Film Preservation 1993, Vol. 4: Submissions* 181-85 (1993) ("*1993 Librarian of Congress Submissions*").

[the studios], but it's a welcome turn of events for movie lovers who now have greater access to more films than at any time in history." Frank Thompson, *Lost Films* xiii (1996).

b. *Restoring and preserving old films is expensive.* Restoration and preservation typically involve several steps, including locating or piecing together a complete copy of the film, often from a variety of components created during the original production of the film, some of which may be scattered among different repositories; fixing physical and chemical damage; copying the film onto new film stock; making "separation masters" that preserve the film's visual richness more effectively than a single print; and storing the film in a cold, dry vault.[23] The exact cost of restoration and preservation depends on the type of film and its state of decay, but a decade ago the Librarian of Congress estimated that preserving a color feature film typically cost $25,000 to $40,000, and sometimes much more—not including the cost of ongoing storage.[24] In recent years, those costs have only risen, with many films costing hundreds of thousands of dollars, and some millions of dollars, to preserve and restore.[25] Universal Studios, for example, spent $500,000 restoring the Alfred Hitchcock classic "Rear Window" (1954).[26] Warner Bros. spent more than $350,000 restoring "Casablanca" (1942) and close to $1,000,000 reviving "Gone With the Wind" (1939).[27]

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[23] *See, e.g., 1993 Librarian of Congress Report* at 7-12.

[24] *See id.* at 11 & n.28.

[25] The National Film Preservation Board now puts the average cost of restoring and preserving a color feature at $50,000 to $300,000. *See* Doug Nye, *Old Films, Fading Fast*, The State, July 8, 2001, at E3.

[26] *See, e.g.*, Jami Bernard, *Window Dressing: Hitchcock's Classic Thriller Is Lovingly Restored—And Sealed with A 70G Kiss*, N. Y. Daily News, Jan. 16, 2000, at 21.

[27] Copies of the restored version of "Casablanca" on DVD have been lodged with the Court.

"The Adventures of Tom Sawyer" (1938), a classic just now being released on DVD, helps illustrate the difficulty and expense involved in restoring old films. Originally produced on nitrate stock, "Tom Sawyer" ran 93 minutes. By the time serious restoration efforts began in 2000, 13 minutes of the film were missing and much of it had suffered shrinkage and color fading. The sound track was riddled with clicks and pops. Over the course of a year and a half, with an investment of 1000 hours of labor and more than $300,000 in chemical and physical repairs, the 13 missing minutes were reconstructed through hundreds of frame-by-frame insertions, high-quality three-color negatives and master prints were recreated, and the film was translated onto a digital medium. The result will be available around the world on DVD by the end of the year.

c. *Term extension enables copyright owners to defray the costs of restoration and preservation and promote distribution.* Relatively new media such as cable television, videocassettes, and DVDs offer holders of copyrighted films vehicles for generating the substantial sums required for restoration and preservation. As Senator Feinstein noted in her opening statement during the Senate Judiciary Committee's hearing on the CTEA, "[v]ideocassettes, cable television, and new satellite delivery systems have extended the commercial life of movies and television series."[28] And that extended life enables older films to generate the dollars needed to recoup the cost of their restoration.[29]

But the costs of preservation and restoration must be invested up front, and, as many witnesses at the CTEA hearings noted, individuals or firms are unlikely to make the re-

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[28] *1995 Senate Hearing* at 4; *see* S. Rep. No. 104-315, at 6, 12; *1995 House Hearings* at 190 (Marybeth Peters), 283 (Prof. John Belton) (1995); *see also* 1993 Copyright Office Hearing at 9-10 (Hal David), 58-59 (Bernard Sorkin).

[29] *See, e.g.*, Darrel Satzman, *Building A Future in Preserving Films' Past*, Los Angeles Bus. J., Jan. 28, 2002, at 24.

quired investment in the absence of copyright protection. Films that enter the public domain thus fall prey to a "tragedy of the commons," in which no one steps forward to invest in their restoration or preservation.[30] As then Commissioner Bruce Lehman explained at the Senate Judiciary Committee's hearing on the CTEA, many public domain films "have been lost to the public forever and never reissued . . . because nobody had the economic incentive to do so."[31] By contrast, it is the films protected by copyright that are properly preserved and restored.[32]

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[30] *See 1995 House Hearings* at 52, 54-55 (Jack Valenti), 86 (Marilyn Bergman), 95 (Jack Valenti), 96 (Edward P. Murphy), 217-18 (Bruce Lehman); *1995 Senate Hearing* at 41 (Jack Valenti); *see also* 1993 Copyright Office Hearing at 30-31 (Susan Mann), 50 (Eric Schwartz) ("during the automatic renewal bill [debate], Congress was convinced . . . that works are more likely to be available when they are under copyright protection than when the term of protection expires for most commercial works.").

[31] *1995 Senate Hearing* at 38.

[32] *See, e.g., 1995 House Hearings* at 431 (reprinting *1994 Librarian of Congress Report*) ("there is increasing reason to believe that the preservation of the older Hollywood feature, long the central emphasis among public archives, might be supported by commercial interests"); *see also* Orrin G. Hatch, *Toward A Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. Pitt. L. Rev. 719, 736-37 (1998).

The history of Frank Capra's "It's A Wonderful Life" (1946) shows that copyright protection promotes preservation and distribution. For a period, it was believed that "It's A Wonderful Life" was in the public domain. During that period, no one invested in restoring and preserving it, and consequently the copies shown on television and released on videocassette were "horrid." *Two Days of Christmas Classics*, Toronto Star, Dec. 24, 2000, at E1. Only when the holder of the copyright in the musical score and the underlying story used those rights to regain control over distribution of the movie did the film get the preservation attention it required. At that time, the copyright holder invested the money needed to restore the film's picture quality and to return it to its full length. The restored version, showing the "sharp, crisp production made by Capra in 1946," Larry Bonko, *"Wonderful Life" Has Become a TV Treasure*, Virginia-Pilot (Norfolk, VA), Dec. 24, 1999, at E2, is widely available on videocassette.

The importance of copyright as a tool for promoting film preservation gains powerful support, then, from the very contrast between the fate of copyrighted and public domain films that petitioners appear to acknowledge. The contrast is both quantitative and qualitative. As for quantity, petitioners concede (Br. 46) that the CTEA's term extension may help encourage the preservation of as many as 14,000 films from the years before 1943 alone. Although petitioners suggest that 14,000 is a trifling number, they offer no figure for public domain films privately preserved, perhaps because that figure is much smaller. As for quality, the copyrighted films preserved by the studios include hundreds of classics of American cinema. For example, films released in 1939 alone include "Beau Geste," "Destry Rides Again," "Gone With the Wind," "Goodbye Mr. Chips," "Gunga Din," "Mr. Smith Goes to Washington," "Stagecoach," "The Wizard of Oz," "Wuthering Heights," and "Young Mr. Lincoln." While many of the "orphan" films petitioners emphasize are culturally significant, they are of no greater value than the copyrighted titles being preserved in studio libraries. Moreover, while restorations done by the studios have, by and large, been of the highest quality, by contrast old public domain films that have been privately re-issued have generally been poor quality copies of prints that have not been properly restored.[33]

Copyright protection promotes not only preservation but also wider distribution of older films. In general, distributors of public domain films have not invested as much as copyright holders in promoting wide distribution of their titles and

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[33] *See 1995 Senate Hearing* at 42 (Jack Valenti); 1993 Copyright Office Hearing at 62-63, 66-67, 72 (Bernard Sorkin); *see also 1995 House Hearings* at 593 (Prof. Shira Perlmutter), 633-34 (Coalition of Creators and Copyright Owners); *1995 Senate Hearing* at 3 (Sen. Hatch).

thus in ensuring widespread public access to those titles.[34] As Register of Copyrights Marybeth Peters explained in response to a question from the Senate Judiciary Committee during consideration of the CTEA, "many works may be more readily available [to] the public, and in better and more usable condition, when they are still protected by copyright. Copyright protection gives publishers and producers an incentive to invest in the expensive and time-consuming activities that may be required to preserve, update, and restore older works."[35]

3. Congress reasonably rejected petitioners' contrary arguments about preservation, restoration, and distribution of films.

Petitioners and amici Hal Roach Studios and Michael Agee ("HRS") offer a number of arguments why, contrary to Congress's express finding, term extension will not promote the preservation of older films. Congress considered those arguments and reasonably rejected them. Petitioners and HRS now ask the Court to second-guess that factually complex, predictive judgment, which it was Congress's prerogative—and responsibility—to make.

The first two arguments concern so-called "orphan" films, that is, films that lack "either clear copyright holders or commercial potential to pay for their continued preservation."[36] Even if petitioners and HRS were right that the

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[34] *See 1995 Senate Hearing* at 34-35 (Bruce Lehman); *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; Copyright Per Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 105th Cong. 47 (Fritz Attaway) (1997) ("*1997 House Hearing*"); *see also* 1993 Copyright Office Hearing at 31, 35 (Susan Mann), 80 (Bernard Sorkin); Library of Congress, *Film Preservation 1993, Vol. 2: Los Angeles, CA Hearing* 59 (Philip Murphy) (1993) ("*1993 Librarian of Congress L.A. Hearing*").

[35] *1995 Senate Hearing* at 115.

[36] *1993 Librarian of Congress Report* at 5.

CTEA's term extension fails to promote the preservation of such films, Congress could reasonably have determined that term extension *would* promote the preservation of another large, and culturally significant, body of older films. The latter group includes, but is not limited to, the movies made during Hollywood's golden age—for example, "All Quiet on the Western Front" (1930), "Frankenstein" (1931),"Grand Hotel" (1932), "King Kong" (1933), "It Happened One Night" (1934), "The Thin Man" (1934), "Top Hat" (1935), "Mr. Deeds Goes to Town" (1936), "Snow White" (1937), "Boy's Town" (1938), "Fantasia" (1940), and "The Maltese Falcon" (1941). A focus on studio films seems all the more reasonable when one recognizes, as petitioners fail to do, that Congress had already addressed the broader issue of film preservation, and the problem of orphan films in particular, through other vehicles.[37]

Petitioners and HRS contend that uncertainty over copyright status constitutes the major obstacle to the preservation of many films, and that the CTEA's term extension prolongs that uncertainty for 20 years. *See* Pet. Br. 44-45; Brief of

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[37] Congress has addressed the broader problem of film preservation through a trio of National Film Preservation Acts. *See* National Film Preservation Act of 1988, Pub. L. No. 100-446, 102 Stat. 1782-87; National Film Preservation Act of 1992, Pub. L. No. 102-307, 106 Stat. 267-72; National Film Preservation Act of 1996, Pub. L. No. 104-285, 110 Stat. 3377-82. The first of those statutes created the National Film Preservation Board, which identifies films of particular historical or cultural importance. Pursuant to the second, the Librarian of Congress, in conjunction with the Board, established a national film preservation strategy based on collaboration between studios, archives, collectors, and the government. The third established the National Film Preservation Foundation, which has raised millions of dollars from private sources for preservation efforts and which possesses the authority to distribute federal matching grants as well. It is principally through these enactments that Congress has sought to ensure the survival of our nation's entire film heritage, and to address the problem of orphan films in particular. As the House report on the 1996 Act noted, "'orphan' films . . . are the focus of this legislation." H.R. Rep. No. 104-558, pt. I, at 10 (1996).

HRS 14-18. In a rare case, the expense of difficult copyright research and the risk of infringement litigation might deter investment in the preservation and distribution of a film. But as a general matter it is lack of funding, not uncertainties about copyright status, that impedes the preservation and restoration of orphan films.[38] Indeed, the Librarian of Congress's 1993 report on film preservation called lack of funding "[t]he defining problem for public archive preservation programs."[39] That chronic shortage of money, which Congress has sought to address in part by establishing the National Film Preservation Foundation, predates the CTEA.

Furthermore, whether or not a film has a clear copyright holder, under statutory provisions such as § 108 pertaining to libraries and archives, the Copyright Act leaves considerable room for preservation activities. *See* 17 U.S.C. § 108(a)-(c). Moreover, the CTEA added a subsection to § 108 that broadens these rights during the extended term. *See* 17 U.S.C. § 108(h). Section 108 is a perfect illustration of how Congress has rationally exercised its power under the Copyright Clause by striking a careful balance among the interests of the public, libraries, archives, and copyright holders. The CTEA cannot be viewed in a vacuum, but must be recognized as just one piece of a complex and comprehensive copyright scheme that serves many interests, not just those of copyright holders, and that, as a whole, "promote[s] the Progress of Science."

HRS contends (Br. 18-21) that the CTEA will not help spur the restoration and preservation even of films with readily identifiable copyright holders. They assert that only a small fraction of these films have immediate commercial potential and that the rest, including many silent features, will

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[38] Several witnesses made this point during the hearings on the CTEA. *See, e.g., 1995 House Hearings* at 65, 87, 93 (Edward Richmond), 110 (Martha Coolidge).

[39] *1993 Librarian of Congress Report* at 24.

be abandoned to decay. This argument misses the mark for three reasons. *First*, as the Librarian of Congress's 1993 study of film preservation found, cold, dry storage is normally the essential first step in preserving films for the long term.[40] In recent years, in response to the commercial incentives created by copyright protection, the studios have begun to invest tens of millions of dollars in creating and maintaining state-of-the-art storage vaults. Entire libraries, not just titles with obvious, immediate commercial potential, have been placed in the new storage facilities.[41] *Second*, HRS mistakenly assumes that the major studios can readily identify those films that will have the greatest commercial potential throughout their copyright term. The studios in fact lack such prescience, which is one reason their comprehensive preservation programs are economically rational.[42] *Third*, films are often most valuable not in isolation, but as part of collections or libraries. Thus, the incentive to preserve well known titles often carries with it an incentive to preserve other, less well known films. For all these reasons, commercial incentives resting on copyright prompt the major studios

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[40] The Librarian of Congress's national plan for film preservation described cold, dry storage as "the cornerstone of national film preservation policy." *1994 Librarian of Congress Report* at 6; *see id.* at 5-7; *1993 Librarian of Congress Report* at 12-15; Library of Congress, *Film Preservation 1993, Vol. 3: Washington D.C. Hearing* at 117-18; *1993 Librarian of Congress Submissions* at 181-85; Karen Kalish, *Film Preservation: A Practical Guide*, 77 Am. Cinematographer 123 (1996).

[41] *See The State of the Art*, 82 Am. Cinematographer 86 (2001).

[42] Even some films that today we think of as classics did not show their commercial potential until many years after their initial release. When "The Wizard of Oz" came out in 1939, for example, it was a failure at the box office, costing Metro-Goldwyn-Mayer nearly $1 million (the equivalent of $10 million today). It only gained wide popularity through re-release on television in the 1950s and 1960s, and eventually on videocassette and DVD. *See* Aljean Harmetz, *The Making of the Wizard of Oz* 288-90 (1977).

to preserve and restore entire film libraries, as numerous sources have recognized.[43]

4. Congress reasonably concluded that bringing U.S. copyright terms more closely in line with those of the European Union countries would "promote the Progress of Science."

Harmonizing U.S. copyright laws with those of our European Union ("E.U.") trading partners strengthens our cultural vitality and thus "promote[s] the Progress of Science" in at least two significant ways, each of which Congress considered. First, in light of the "rule of the shorter term,"[44] bringing U.S. copyright terms more closely in line with those in the E.U. boosts the export income of U.S. copyright holders and thus helps subsidize the creation of new works.[45] Second, international harmonization enables the

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[43] *See, e.g., 1993 Librarian of Congress L.A. Hearing* at 28 (Robert Heiber), 34-35, 41, 59 (Philip Murphy); *1993 Librarian of Congress Submissions* at 35; *Copyright Amendments Act of 1991: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Judiciary Comm.*, 102d Cong. 351-53 (1991) (Nicholas Counter III). It is the very power of the commercial incentives supporting preservation and restoration of copyrighted films that has led to the recognition of the "orphan film" problem. *See 1994 Librarian of Congress Report* at 3.

[44] The "rule of the shorter term," as implemented by member countries of the E.U., provides that a non-E.U. copyrighted work cannot be protected longer than it is in the work's country of origin. Prior to enactment of the CTEA, U.S. films that were works made for hire (*i.e.*, almost all U.S. films) were entitled to receive copyright protection for no more than 75 years after publication. After the end of that term, U.S. films could continue to be exploited in the E.U., but, in contrast to E.U. films of the same age, neither the U.S. copyright owners, nor the other participants in the U.S. films' revenues would be paid.

[45] *See, e.g., 1995 House Hearings* at 2 (Rep. Moorhead), 61-62 (Marilyn Bergman), 109 (Martha Coolidge), 212, 215-17 (Bruce Lehman), 589-90 (Prof. Shira Perlmutter); *1995 Senate Hearings* at 2 (Sen. Hatch), 25 (Bruce Lehman), 140 (Intellectual Property Law Section, American Bar Ass'n), 142 (George David Weiss).

United States to play a leading role in shaping global standards for effective and balanced copyright protection, including encouraging stronger copyright protection in the developing world.[46]

Petitioners insist (Br. 43) that harmonization is "a fantasy." Congress, however, expressly found that the CTEA would boost harmonization, and it did so based on an extensive record. Both the House and Senate reports identify "substantially harmonizing U.S. copyright law to that of the European Union" as one of the CTEA's principal benefits. S. Rep. No. 104-315, at 3; *see id.* at 7-8; H.R. Rep. No. 105-452, at 4. The Register of Copyrights, the United States Trade Representative, the Commissioner of Patents and Trademarks, and many others at the hearings on the CTEA testified that the CTEA would bring significant improvement in the alignment of U.S. and E.U. copyright terms.[47]

The basis for that collective judgment is clear. In 1993 the Council of the E.U. issued a directive requiring member states to bring their basic copyright terms to life of the author

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[46] *See, e.g., 1995 House Hearings* at 142 (Judith Saffer), 159 (Marybeth Peters), 207 (Charlene Barshefsky); *1995 Senate Hearing* at 30 (Marybeth Peters); *see also* 1993 Copyright Office Hearing at 11 (Hal David), 30-33 (Susan Mann).

[47] *See 1995 House Hearings* at 158, 161-63, 174-78, 196-97, 201 (Marybeth Peters, Register of Copyrights), 205-06, 209-10 (Charlene Barshefsky, U.S. Trade Representative), 215 (Bruce Lehman, Commissioner of Patents and Trademarks), 224 (Rep. Patricia Schroeder), 605-15 (Coalition of Creators and Copyright Owners), 641-74 (Lisa M. Brownlee); *1995 Senate Hearing* at 1 (Sen. Hatch), 4 (Sen. Feinstein), 6, 8-9, 11-12, 20-21 (Marybeth Peters), 25, 28 (Bruce Lehman), 44 (Alan Menken), 114-15 (Marybeth Peters), 117-18 (Bruce Lehman), 128-31 (Coalition of Creators and Copyright Owners), 139-41 (Intellectual Property Law Section, American Bar Ass'n,), 147 (Jonathan Tasini), *1997 House Hearing* at 3 (Rep. Coble), 32-33 (Francis Preston), 38 (George David Weiss), 46-48 (Fritz Attaway).

plus 70 years by July 1, 1995.[48] By the time of the CTEA's enactment, every E.U. country had done so.[49] By making the term for works by natural authors life plus 70 years, the CTEA clearly brings the United States into agreement with our E.U. trading partners on the duration of the most basic copyright term.

Petitioners make two sorts of arguments to deflect attention from that fact. Congress considered and rejected both. First, they note that, while the CTEA made the term for works by single authors identical to the basic term in the E.U., it left the terms for various special categories of works different from E.U. standards. This argument sets up a straw man. Proponents of the CTEA did not urge, and Congress did not find, that the CTEA would bring U.S. copyright terms into perfect alignment with those in the E.U. As the Senate report carefully put it, the CTEA would "substantially" harmonize U.S. and E.U. terms. S. Rep. No. 104-315, at 3. Petitioners offer no evidence to call that cautious judgment into question.[50]

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[48] *See* Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, art. 1, ¶ 1; art. 13.

[49] *See* 144 Cong. Rec. S12377 (daily ed. Oct. 12, 1998) (Sen. Hatch). When the Senate held hearings on the CTEA in the fall of 1995, many European countries had already adopted the new standard. *See 1995 Senate Hearing* at 114-15 (Marybeth Peters).

[50] Petitioners' argument that the CTEA actually increases disharmony between U.S. and E.U. copyright terms also markedly understates the degree of increased harmony achieved for certain categories of works, particularly those for which the methods of calculating the term differ between the United States and the E.U. countries. Movies, for example, typically receive a flat term in the United States as works for hire. The CTEA increased that term from the lesser of 75 years from publication or 100 years from creation to the lesser of 95 years from publication or 120 years from creation. The E.U. countries by and large do not treat works for hire as a separate category. For movies in particular, the term runs until 70 years after the death of the last survivor of four principal contributors (director, screenplay author, dialogue author, composer), a term which is normally in excess of 95 years from publication. Thus, although U.S. law uses a different method of calculating the duration of the term, the CTEA's shift from 75 to 95 years from publication has the effect of moving the U.S. term closer to the typical E.U. term.

Petitioners' second argument is that life plus 70 years is further out of line with the rest of the world's copyright regimes than is life plus 50 years. Again, this argument is misleading. Supporters of the CTEA argued, and Congress found, that the CTEA would improve harmony between U.S. copyright terms and those of the E.U. nations, not necessarily with countries outside of the E.U.[51] Congress had a compelling reason for focusing on Europe: Europe accounts for a large percentage of U.S. trade in copyrighted goods.[52]

But in the end, petitioners' contention that Congress erred in finding that the CTEA would increase the harmony between the U.S. and E.U. copyright systems suffers from one overarching, and fatal, flaw. Every factual argument against harmonization made by petitioners before this Court was presented to Congress during its consideration of the CTEA.[53] Congress considered both those arguments and the arguments on the other side, and concluded that the CTEA would, overall, improve harmony between the U.S. and E.U. copyright regimes. Petitioners may disagree with that judgment, but it was Congress's to make.

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[51] In fact, many countries outside the E.U. have adopted a basic term of life plus 70 years. Those countries include Argentina, Brazil, Bulgaria, Croatia, the Czech Republic, Ecuador, Egypt, Indonesia, Iceland, Israel, Hungary, Lithuania, Nicaragua, Nigeria, Norway, Paraguay, Peru, Poland, Romania, Slovakia, and Slovenia.

[52] For example, in 1999, the E.U. countries accounted for approximately 66 percent of the revenues from rental of U.S. movies and videos overseas. *See* U.S. Dep't of Commerce, Bureau of Economic Analysis, *Survey of Current Business* 148 (2000).

[53] *See, e.g., 1995 House Hearings* at 281-82 (Prof. John Belton), 304-308 (Prof. Dennis Karjala), 355-407 (Prof. J.H. Reichman); *1995 Senate Hearing* at 86-89 (Prof. Dennis Karjala).

II. THE FIRST AMENDMENT DOES NOT REQUIRE HEIGHTENED SCRUTINY OF CONGRESS'S DECISION TO APPLY A TERM EXTENSION TO EXISTING WORKS.

Presumably recognizing that they cannot prevail under the ordinary standard of review, petitioners couch much of their argument (Br. 34-48) in the language of "intermediate scrutiny" under the First Amendment. In petitioners' view (Br. 37-38), essentially every provision of the copyright laws "regulates speech" in the First Amendment sense. Thus, under petitioners' theory, almost every decision Congress makes with respect to the scope or other aspects of copyright protection would be subject to judicial inquiry into whether the provision is "narrowly tailored" to serve an "important governmental interest." Such challenges would require extensive litigation to consider not only what Congress could reasonably have concluded, but also what evidence it considered and whether it could have adopted some other rule that would have "promote[d] the Progress of Science" in a more "narrowly tailored" fashion.[54] That approach would have surprised those who drafted both the First Amendment and the Copyright Clause.[55]

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[54] *See* Pet. Br. 39-40, 47-8. Petitioners concede (Br. 14) that, for purposes of the Copyright Clause, there is no basis for the Court to second-guess the length of the copyright term established by the CTEA for new copyrights. They make no similar concession, however, for purposes of the First Amendment—raising the specter that courts will be asked to determine whether each substantive provision and each term of protection is "narrowly tailored" to serve an "important governmental interest." For example, courts might be called on to consider whether hot news stories require the same length of protection as classical music compositions, or whether different levels of protection are required to satisfy the narrow tailoring requirement.

[55] The court of appeals may have overstated its point in the other direction when it suggested in dictum (Pet. App. 6a) that all copyright enactments are "categorically immune" from First Amendment challenge. A law granting copyright protection to works that speak favorably of the government, but not to those that are critical of it, for example, would certainly fail First Amendment scrutiny. This Court's cases, however, have never suggested any position remotely as sweeping as that advanced by petitioners.

[56] As one scholar has noted, "[w]hat Eric Eldred proposes to do is recirculate other people's speech. The First Amendment is certainly about the freedom to make your own speech. Whether it is about the freedom to make other people's speeches again for them, I have some doubt." Jane Ginsburg, *Symposi[um]: The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 Cardozo Arts & Ent. L.J. 651, 701 (2000).

To begin with, the Court has observed, in considering an alleged conflict between copyright and the First Amendment, that "it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558. It has further noted that the right of free speech includes not only the right to speak, but also the right "to refrain from speaking at all," *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), and that copyright also serves that "countervailing First Amendment value." *Harper & Row*, 471 U.S. at 559-60 (citing *Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981)). Thus, the Court has recognized that copyright generally promotes, rather than conflicts with, First Amendment values. Moreover, while the First Amendment protects each individual's right to control his or her own expression, what petitioners seek to establish is something quite different: a constitutional right to "make commercial use of the copyrighted works of others."[56] Pet. App. 6a. This Court has never recognized such a right.

Whatever tension remains between copyright and the First Amendment is fully accommodated, as the court of appeals recognized (Pet. App. 5a-8a), through the idea/expression distinction and the doctrine of fair use—without subjecting all of copyright law to heightened consti-

tutional review. The former leaves ideas free of copyright regulation, allowing protection only for an author's particular expression. 17 U.S.C. § 102(b); *see, e.g.*, *Feist*, 499 U.S. at 345 ("The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates.'" (quoting *Harper & Row*, 471 U.S. at 556)). The Court has described with approval Justice Brennan's resulting conclusion that "[c]opyright laws are not restrictions on freedom of speech[,] as copyright protects only form of expression and not the ideas expressed." *Harper & Row*, 471 U.S. at 556 (describing *New York Times Co.* v. *United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring)).[57]

As to expression, the fair-use doctrine excludes from infringing activities reasonable uses of a copyrighted work for "purposes such as criticism [or] comment." 17 U.S.C. § 107. Judicial application of the "latitude for scholarship and comment traditionally afforded by fair-use" suffices to protect any speech values not already protected by the idea/expression distinction and the very nature of copyright, without constitutionalizing every copyright case. *Harper & Row*, 471 U.S. at 560.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[57] The idea/expression distinction also deflates petitioners' argument (Br. 7) that present copyright terms critically diminish public discourse. Every idea, theory, or fact embodied in a copyrighted work becomes freely available to the public at the moment of its publication. All that copyright law protects is an author's particular expression.

Respectfully submitted.

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OCTOBER TERM, 2001

ERIC ELDRED, *et al.*,

Petitioners,

-v.-

JOHN D. ASHCROFT,

in his official capacity as Attorney General,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICI CURIAE AMSONG, INC. IN SUPPORT OF RESPONDENT

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Interests of Amicus Curiae[1]

This Brief Amicus Curiae in support of the Respondent is submitted pursuant to Rule 37 of the Rules of this Court.

AmSong, Inc. (hereafter "AmSong") is a California corporation dedicated to the protection of musical copyrights. Its mandate is to educate its members regarding issues affecting musical copyrights and to act as an advocate for songwriters and their heirs in the national and international arenas. AmSong was formed in 1994 with the specific and immediate goal of urging Congress to extend the term of copyright in the United States so as to afford American creators and their heirs adequate copyright protection and bring our laws in harmony with the duration provisions enacted by the countries comprising the European Union. The Board of Directors of AmSong are Shana Alexander, Hoagy Bix Carmichael, Ellen Donaldson, Marsha Durham, Molly Hyman, Mick Jones, Laura Joplin, Jack Lawrence, Jo Sullivan Loesser, Thelonious Monk, Jr., Elizabeth Peters, Julia Riva, E. Randol Schoenberg, Paul Schwartz, Mike Stoller, Michael S. Strunsky, Margaret Styne, Jamie Bernstein Thomas, and John Waxman.

AmSong is not a collection society. It depends on the dues and contributions of its members to sustain its activities. AmSong's members include composers, lyricists and the heirs of deceased songwriters who participate in the organization on a voluntary basis. AmSong members represent every genre of American music, including jazz, rock, pop, country, musical theater and classical. Many of the compositions of AmSong members that would have fallen into the public domain if the Copyright Term Extension Act of 1998 (hereinafter "CTEA")

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[1] Counsel for Petitioners and Respondent have consented to the filing of this Brief. Their consent letters have been filed with the clerk of the Court. No counsel for a party, or anyone else except for amicus, has authored this Brief in whole or in part, or made any monetary contribution in any form.

had not been enacted can only be described as national treasures. Among these musical compositions are "Rhapsody In Blue" by George Gershwin; "Yes Sir! That's My Baby" by Walter Donaldson and Gus Kahn; "Ain't She Sweet" by Milton Ager and Jack Yellin; "Stardust" by Hoagy Carmichael; and "Let's Do It (Let's Fall In Love)" by Cole Porter.

It is the widows, children and legal successors of the creators of these treasures who would be harmed if the CTEA is declared unconstitutional.

Summary of Argument

This Brief will not duplicate the many legal arguments regarding the constitutionality of the CTEA. Amicus AmSong joins the Briefs of Respondent, and those amici joining Respondent, as to the constitutionality of the CTEA. This Brief is submitted to put a "face" to the individuals whom CTEA protects.

While the Petitioners have attempted to focus the Court's attention on certain corporations that lobbied for the copyright term extension, [2] it is submitted that the characterization of the lobbying parties is disingenuous on two levels. First, Plaintiff Eldred and the other Petitioners profit from their exploitation of public domain materials. It is in their respective financial interests to have copyrights expire in the shortest time possible. By their opposition to an extended term, Petitioners ultimately wish to step in and take over the authors' legacy. Second, even if certain corporations benefit from the CTEA, it is the songwriters of AmSong and their heirs who truly reap the benefits of copyright extension, and rightfully so.

As stated succinctly in his Amicus Curiae Brief,

[2] The infamous "Mickey Mouse Extension" moniker, which has attached itself to CTEA.

Professor of Law Edward Samuels:

> The various extensions of copyright over the years, balanced by careful limitations on the rights of copyright owners, are not the result of some nefarious scheme by corporations to cheat the public of their rights. Rather, they are part of the remarkable system envisioned by the framers of the Constitution, and implemented by the Congress and the President, to "Promote the Progress of Science and useful Arts" by doing exactly what the Constitution says they are supposed to do, "by securing, for limited times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."(p. 30)

This Brief will focus on how the CTEA does in fact "promote the progress of Science and useful Arts" as mandated by the Constitution, by offering incentives to songwriters and their heirs to preserve musical works, to create new arrangements and to make never before published works available to the public.

This Brief is also submitted to show the necessity of parity between American songwriters and their international counterparts, and to discredit the notion that public domain equates to public benefit.

It is submitted that the facts stated below show that Eldred's position does nothing more than provide profit to those institutions that oppose the CTEA for their own gain by avoiding royalty payments to authors and their heirs once a work enters the public domain.

Ultimately, no constitutional justification exists for Eldred's arguments. Congress acted in compliance with intent

of the United States Constitution when it enacted the CTEA.

Question Presented

The question presented in this case is whether Congress had constitutional power to enact the Copyright Term Extension Act of 1998.

Legislative Background

From the 1920s through the 1940s, several bills were introduced to harmonize the federal copyright law with the minimum life-plus-50-year copyright term established by the Berne Convention.

Beginning in 1962, Congress extended the terms of existing copyrights for successive brief periods of one year or more in order to allow Congress the opportunity to address other aspects of the proposed new Copyright Act. The purpose of these interim extensions was to prevent copyrights nearing the end of their statutory protection from falling into the public domain before proposed legislation containing a longer term became effective.

In the Copyright Act of 1976, duration of copyright for works created or published on or after January 1, 1978 was set as the author's life-plus-50 years. With respect to works published or registered prior to January 1, 1978, the term was established as 75 years from publication or registration. Act of Oct. 19, 1976, §§ 302, 303, Publ. L. No. 94-553, 90 Stat. 2598 (hereinafter "1976 Act").[3]

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[3] The report of the House Committee listed the following reasons, among others, for extending the term of copyright:

> "1. The present 56 year term is not long enough to insure an author and his dependents the fair economic benefits

The Copyright Act of 1976 paved the way for United States adherence to the Berne Convention, which finally came about on March 1, 1989, pursuant to the Berne Convention

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> from his works. Life expectancy has increased substantially, and more and more authors are seeing their works fall into the public domain during their lifetimes . . .
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> .
>
> 2. The tremendous growth in communications media has substantially lengthened the commercial life of a great many works. A short term is particularly discriminatory against serious works . . . whose value may not be recognized until after many years.
>
> 3. . . . [T]oo short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works. . . . In some cases the lack of copyright protection actually restrains dissemination for the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.
>
> . . . .
>
> 7. A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after his death. . . . Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. . . . Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations . . . ."

H.R. Rep. No. 94-1476, at 134-35 (1976).

Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

In 1998, Congress amended the 1976 Act by enacting the Sonny Bono Copyright Term Extension Act, which was passed by voice votes in both the Senate and the House. The Act extended the federal copyright term by 20 years. See CTEA § 102(b)-(d). Specifically, the CTEA extended the term of copyrights in works created on or after January 1, 1978 to the life of the author plus 70 years. CTEA § 102(b). The term of copyrights in works created prior to January 1, 1978 was also increased by 20 years, to a total term of 95 years from publication or registration. CTEA § 102(d).

The United States Copyright Law is unique in that it provides for two different standards of copyright protection: a flat term of 95 years (prior to the CTEA, it was 75 years) for works registered or published prior to January 1, 1978 and a term measured by the life of the author plus 70 years (prior to the CTEA, it was life-plus-50 years) for works created on or after January 1, 1978. The intent of Congress was that the flat term of protection for pre-1978 works would correspond to the "life plus" standard for works written on or after January 1, 1978. Unfortunately, in many cases there is a vast disparity.

In the most extreme example, the songwriter himself outlived his compositions. Irving Berlin lost twenty songs to the public domain, including the still-popular "Alexander's Ragtime Band" during his lifetime. This surely was not in keeping with the intent of Congress in providing for copyright protection for authors.

Even where the songs survived the composer, the flat term of protection often proved far shorter than "life plus" protection afforded post January 1, 1978 works. The renowned composer Hoagy Carmichael died in 1981. Prior to the enactment of the CTEA, his works would have been protected

through 2031 if they were created on or after January 1, 1978. However, since most of Hoagy Carmichael's compositions were registered or published prior to that date, the works were protected for a far shorter period. For example, the ever-popular "Stardust" was copyrighted in 1928. Absent the CTEA, the song would have entered the public domain at the end of 2003, over 27 years earlier than the term which it would have enjoyed if it was protected by the life-plus-50 term of protection. Another great Carmichael composition, "Georgia On My Mind" was copyrighted in 1930. Prior to the enactment of the CTEA, the work would have entered the public domain at the end of 2005, only 25 years after the death of Hoagy Carmichael.

Similarly, many of the works of the great lyricist Ira Gershwin were accorded an unduly short term of copyright prior to the enactment of the CTEA. Ira Gershwin died in 1983. The pre-CTEA term of life-plus-50 would have caused his works to be protected through 2033. However, the works of Ira Gershwin were subject to the flat term of protection of 75 years, and accordingly many of his greatest works were subject to a shorter term of protection. "Fascinatin' Rhythm" and "The Man I Love" were copyrighted in 1924, and, but for the CTEA, would have entered the public domain at the end of 1999, thirty-four years earlier than the life-plus-50 standard.

The composer Milton Ager wrote "Happy Days Are Here Again" in 1929. Under the pre-CTEA term of protection, the work would have entered the public domain at the end of 2004, only 25 years after Ager's death in 1979.

While a discrepancy still exists between the flat term of 95 years of copyright protection accorded pre-1978 works under the CTEA and the life-plus-70 standard accorded works written on or after January 1, 1978 pursuant to the 1976 Act, the authors of these great American standards, and their heirs, find some relief in the additional 20 years of protection. If the CTEA is overturned, these pre-1978 works will not endure for

the life of the author plus two generations of successors, which is the traditional standard of protection. *See, e.g.*, H.R. Rep. No. 105 452, at 4 (1998).

I. The CTEA Promotes the Progress of Science and the Useful Arts

There is no question but that term extension motivates the creative activity of authors.

> "[T]he basic functions of copyright protection are best served by the accrual of the benefits of increased commercial life to the creator for two reasons. First, the promise of additional income will increase existing incentives to create new and derivative works. *The fact that the promise of additional income is not realized for many years down the road does not diminish this increased creative incentive. One of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and grandchildren... Second, extended protection for existing works will provide added income with which to subsidize the creation of new works.*"

S. Rep. No. 104-315 at 12 (1996) (emphasis added).

> As this Court has previously noted:
> "[Term extension] is intended to motivate the creative activity of authors and inventors by the provision of special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

AmSong member and composer-lyricist Alan Menken is the author (together with his friend and co-author Howard Ashman) of such recognizable songs and scores as the classic "Little Shop of Horrors". He stated during his testimony to Congress:

> "While it is impossible to ascertain exactly what inspires a person to become a composer rather than a surgeon, or a dentist in my case, it is the reality of life in the 1990s that one must work in order to support oneself and one's family. It is also the reality that we must support our children longer than ever, often into adulthood and the costs of doing so are rising steadily. There comes a point in most people's lives when one must make a practical decision about the choice of a career. The continuing ability to provide for one's family both during and after one's lifetime would certainly be a factor. If it becomes clear that insufficient copyright protection is available to provide that support, there will be less incentive to try to make one's living as a creator." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Alan Menken) 1995 W.L. 557177 (F.D.C.H.).

The Supreme Court, in Mazer v. Stein, 347 U.S. 201, 219 (1954), stated the purpose as follows:

> "the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the

talents of authors and inventors in "Science and useful Arts."[4]

Simply, those who create must be assured of an adequate copyright term.

II. The CTEA Provides Harmonization with the European Union and Parity Between European and American Songwriters

Pursuant to the directive of the European Union, United States copyright owners of works used in Europe would benefit from the European term extension only if the United States copyright term were similarly adjusted. Otherwise, under the so-called "rule of the shorter term," United States copyrights would not be protected in Europe past the expiration of the shorter United States term.[5]

The copyright laws in most European communities encompass life plus a period of time past the death of the author.

In the late 1920s (around the same time George Gershwin created "Rhapsody in Blue"), German authors Berthold Brecht and Kurt Weill wrote "Three Penny Opera" which produced the classic, "Mack the Knife." The Copyright Act of 1909 limited the term of copyright of Gershwin's classic

[4] Note that the Senate report on a 1992 amendment to the Copyright Act rejects the notion that the public benefits from increasing the volume of works in the public domain as "contrary to the real public purpose for copyright protection . . . . " S. Rep. No. 102-194, 102d Cong. 1st Sess. 6 (1991).

[5] Arthur R. Miller, Copyright Term Extension: Boon for American Creators and the American Economy, 45 J. Copyright Soc'y U.S.A. 319, 325 (1997) (hereinafter "Miller").

to what would have been a maximum period of protection of fifty-six years. Without the various term extensions, "Rhapsody in Blue" would have entered the public domain in 1980. Brecht and Weill's "Mack the Knife" would be protected for at least fifty years post mortem, substantially longer than Gershwin's work would have been protected in the United States.[6] Thus the extensions which secured the additional term protection for "Rhapsody in Blue" did nothing more than provide parity of copyright term to Mr. Gershwin's European counterparts.

The CTEA accomplished harmonization of the copyright terms of the United States and the European Union, an important purpose of the CTEA.[7] The United States Copyright Office supported the CTEA for two basic reasons:

[6] In 1950, at the time of Mr. Weill's death, German copyright law was fifty years post mortem. In 1965, the copyright term was extended to seventy years post mortem. *See* Germany's 1901 Act concerning Copyright in Literary and Musical Works and the 1965 Copyright Act.

[7] See, e.g., H.R. Rep. No. 105-452, at 4 (1998) (noting that upon enactment of extension, "U.S. works will generally be protected for the same amount of time as works created by European Union Authors. Therefore, the United States will ensure that profits generated from the sale of U.S. intellectual property abroad will come back to the United States."); The Copyright Term Extension Act of 1995:, Hearing before the Committee on the Judiciary of the United States Senate, 104th Cong. 4 (1995) (hereinafter "Senate Term Extension Hearing") (statement of Sen. Feinstein) ("Perhaps the most compelling reason for this legislation is the need for greater international harmonization of copyright terms."); Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing before the Subcommittee on Courts and Intellectual Property of the Judiciary Committee of the House of Representatives, 105th Cong. 3 (1997) (hereinafter "House Term Extension hearing") (statement of Rep. Coble) ("The change would bring United States copyright protection up to similar levels of protection provided in the European Union member countries."); Miller at 326-27.

"First, in the global information society, there is a need to harmonize copyright terms throughout the world. Moreover, we believe that the life-plus-70 term will become the international norm.

Second, as a leader of creating copyrighted works, the United States should not wait until it is forced to increase its term; rather, it should set an example for other countries."[8]

AmSong member Carlos Santana was one of the first musicians to combine Latin influences and rock. Carlos Santana's musical career has spanned five decades. Long before 'world music' was coined as a phrase, Santana was popularizing it. Mr. Santana stated during Congressional hearings:

> "The discrepancy between the duration of copyright protection in America versus Europe is troubling on several grounds. First, as an American, I am not assured that my creative works will be secure for the lifetimes of my children, to say nothing of my grandchildren.
>
> "Second, as an American songwriter whose works are performed throughout the world, I find it unacceptable that I am accorded inferior copyright protection in the world marketplace." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Carols Santana) 1995 W.L. 557183 (F.D.C.H.)

Congress agreed that "the United States should assert its position as a world leader in the protection of intellectual property by adopting what is increasingly becoming viewed as the future standard of international copyright protection."[9]

AmSong member Bob Dylan's influence on popular music is incalculable. As a songwriter, he pioneered several different schools of pop songwriting. As a musician, he sparked several genres of pop music, including electrified folk-rock and country-rock.

Bob Dylan submitted a statement in favor of the CTEA and spoke eloquently on the point:

> "Our current term of copyright is a flat 75 years for works written prior to 1978, and life-plus-50 years for works written on or after January 1, 1978. This term is significantly shorter than the

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[8] Senate Term Extension Hearing at 7 (statement of Marybeth Peters). The importance of international harmonization of copyright laws is enhanced by "the explosion of the global information infrastructure," which means that "[c]opyrighted works now may be transmitted, virtually instantly, almost anywhere in the world." Miller at 325-26.

[9] S. Rep. No. 104-315, at 8 (1996).

> term of copyright adopted by the fifteen member nations of the European Union, the countries making up the European economic area and the numerous other countries which will be changing their copyright laws to provide a term of life of the author plus 70 years.

The discrepancy between the term of protection offered to American creators and the term of protection offered to European creators is particularly striking. European audiences have always enthusiastically welcomed American popular musicians. They buy our records, they play our music over the airways, and they attend our concerts, often in sell-out crowds. And yet, due to the application of the rule of the shorter term, our works will cease to be protected long before European works of comparable age. The enactment of H.R. 989 will go a long way towards equalizing the playing field for American and European works and rectifying the injustice to American creators." *Copyright Term Extension Act of 1995: Hearing on H.R. 989 before the House of Representatives Judiciary Courts and Intellectual Property Comm. Comm.* (statement of Bob Dylan) 1995 W.L. 418349 (F.D.C.H.).

AmSong member Don Henley, a prolific songwriter and founding member of the Eagles (and one of America's best selling artists for almost 30 years) stated during his testimony:

> "As much as I believe that we are inextricably connected to one another in our individual and collective impact on the global environment, I also believe ours has become a global economy, and American creators should be accorded at least as favorable a protection at law as creators in other countries. We cannot chastise countries which do not provide as high a level of copyright protection as is provided under

> American law, when American law does not provide as high a level of protection as laws in other western countries, such as the European Community." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Don Henley) 1995 W.L. 557182 (F.D.C.H.)

Ellen Donaldson, the daughter of famed Tin Pan Alley songwriter Walter Donaldson, has helped build the entire family business around the songs of her father, in keeping with her father's intention. The 1919 composition "How Ya' Gonna Keep 'Em Down On The Farm After They've Seen Paree" was a World War I anthem which provided substantial income to the family. Prior to the enactment of the CTEA the family lost the song to the public domain. In fact, prior to the enactment of the CTEA, the Donaldson family lost approximately one hundred and fifty economically viable songs to the public domain, including "Carolina In The Morning" and "My Buddy" - - works which would not have gone into the public domain had they been created subject to European copyright terms.

The Berne Copyright Convention and the domestic law of many European countries dictate that the rule of shorter term provides that foreign works are only entitled to the copyright term established by the law in their country of origin if the term there is shorter than that given in the receiving country. Thus, the pre-CTEA term of life of the author plus 50 years created a situation where United States works by American authors not be afforded the additional 20 years of protection provided by the European countries to their nationals.

Petitioners insist that harmonization is "a fantasy." Petitioner's Brief at 43. Congress, however, based on extensive legislative record, found that the CTEA would promote harmonization. By providing the various term extensions, Congress has given parity to American authors' works on a

level with their European counterparts.

III. The CTEA Encourages Investment in Existing Copyrighted Works

Congress also determined that the CTEA is essential to encourage additional investment in existing copyrighted works (such as conversion of works into a digital format).[10] Congress found that such investments will not be made unless a period of exclusivity exists during which owners of copyrights can recoup the costs of such additional investments. Additionally, the CTEA acts as an incentive for songwriters' heirs to expose unpublished works to the public, by ensuring these songs' copyright protection.

The Ira and Lenore Gershwin Trusts is an organization created to manage the copyright interests of one of America's great 20th century lyricists, Ira Gershwin[11]. The Trusts were created by Leonore Gershwin, Ira's wife of 56 years, during her stewardship of his estate. From their inception, the Trusts were imbued with Mrs. Gershwin's imaginative vision, for they were not created merely to collect royalties. Beyond the normal business of managing Ira's copyright interests, the Trusts were charged with creating an archive to acquire, collect, collate and reconstruct materials related to the Gershwin brothers and make the material available to qualified researchers. Eventually this material will join the Gershwin Collection in the Music Division at the Library of Congress, which not coincidentally is one of the major beneficiaries of Mr. and Mrs. Gershwin's estate. The substantial funds that have been forwarded to the

[10] See, e.g., H.R. Rep. No. 105-452, at 4 (1998) (extension will provide "copyright owners generally with the incentive to restore older works and further disseminate them to the public").

[11] The Ira Gershwin Musical Estate is a founding member of AmSong and is the entity represented by Amicus herein.

Library over the last decade comprise one of the largest donations ever made to our nation's library. These funds have underwritten restorations of works thought to have been lost forever, as well as major acquisitions in the field of American musical theatre and film, and have provided the capital for the creation of new works. The Ira and Leonore Gershwin Philanthropic Fund, the other major beneficiary of the estate, primarily endows three areas that were of concern to Mr. and Mrs. Gershwin: the arts, education and medical research.

AmSong member Quincy Jones has been involved in the music business since the early 1950s. He has influenced every style of music from jazz to bop with his work as a producer, vocalist, musician, composer, arranger, and record company president. Quincy Jones stated in his testimony before the House Subcommittee on Courts and Intellectual Property:

> ". . . compelling economic factors mandate an extension of our copyright laws. American intellectual property is this country's second largest export and it also provides a significant revenue base at home. Our country's culture is universally popular; it is heard, seen, performed, and enjoyed everywhere throughout the world. In light of the recent European Union action, copyright term extension in the United States has become an essential element in safeguarding our national economic security. Moreover, every year more and more works are falling into the public domain while they are still commercially viable. This not only deprives the owner of the works and their families the benefits of income, but it diminishes the flowback of taxable revenues generated from overseas sales. We must extend the term of copyright in the United States if we are to

continue to reap the economic benefits of our intellectual property in the world and domestic marketplaces." *Copyright Term Extension Act of 1995: Hearing on H.R. 989 before the House of Representatives Judiciary Courts and Intellectual Property* (statement of Quincy Jones) 1995 W.L. 418350 (F.D.C.H.).

Public endowments by AmSong members made possible by their continued ownership of copyrights include:

- The awarding of gratis licenses to public television stations, schools, libraries and museums for the use of songs by composer Walter Donaldson by his heirs.

- The opening of the George and Ira Gershwin Room at the Library of Congress, which was made possible by the Gershwin heirs.

- The creation of the Hoagy Carmichael Digital Library Program at Indiana University, which makes available 250 hours of sound recordings and 4,550 pages of printed material available in digital form.

- The commencement of the Community Outreach Initiate by the Henry Mancini Institute, which targets schools in disadvantaged communities with live music programs.

- The funding of the Aaron Copland Fund for Music, Inc., which has awarded more than $9 million to support the recording,

performance and dissemination of American music around the world.

The public benefits not by the casting of works into the public domain, but by the distribution of works, both known and unknown, by creators and their heirs - - heirs who in many cases continue to exploit the works by virtue of directives from the creator themselves. (*See also* Brief of Amici Symphonic and Concert Composers Jack Beeson, et al. (hereinafter "Brief of Amici Beeson" pp. 14-20)

III. The CTEA Provides Fair benefits for Authors'

Descendants

To provide creators of artistic works fair compensation for their contributions to American culture, the copyright term has historically been intended to cover the life of the author plus two generations. *See, e.g.*, H.R. Rep. No. 105-452, at 4 (1998); (*see also* Brief of Amici Curiae American Society of Composers, Authors and Publishers, et al. and Brief of Amici Beeson).

Copyright law has always sought to ensure adequate protection for authors, their children and their grandchildren. The CTEA is no different. See, e.g., H.R. Rep. No. 105-452 at 4 (1998) ("Authors will be able to pass along to their children and grandchildren the financial benefits of their works").

In enacting the CTEA, Congress concluded that the terms of 75 years or life-plus-50 years under the previous copyright statute proved insufficient to accomplish that long-standing goal, especially in light of increased life expectancy and later-in-life child bearing in the United States. (*See also* Senate CTEA Hearing 3 (statement of Sen. Hatch); Id. at 140 (statement of American Bar Association Section on Intellectual Property).

No statutory analysis can provide the rationale better than the poignant statements made by the individuals who create the very works that the framers of the Constitution and Copyright Laws sought to protect:

Carlos Santana submitted this statement to Congress:

> "I began writing music in 1968. At that time I was a young man, with no children. Since then, I have written over 200 songs, married, and am fortunate to have three children, now aged 12, 10 and 5.
>
> When I began my career as a songwriter, I believed that I was building a business that would not only bring enjoyment to people throughout the world, but would also give my children a secure base from which they could, in turn, build their own lives. It never occurred to me that because of the application of our copyright laws, my songs would not be sufficiently protected. Yet this is exactly what will happen if S. 483 is not enacted.
>
> In July of this year, the countries of the European Union adopted a term of copyright of life of the author plus 70 years. This term is much more beneficial to authors than the term currently provided for under United States law. Under our law, the works which I wrote prior to 1978 are only protected for a term of 75 years from creation. It is likely that many of these works, including *Samba Pa Ti* and *Europa* will fall into the public domain during the lifetime of my children. The songs which I wrote from January 1, 1978 on will be protected for a term of my life plus 50 years – again, a significantly

> shorter term than is guaranteed to European authors." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Carols Santana) 1995 W.L. 557183 (F.D.C.H.).

Bob Dylan echoed this sentiment:

> "My first song was published by Witmark Music in 1961. My status at the time was 20 years old, unmarried, with no children. My situation changed to include a wife and family and the writing of many more songs.
>
> The impression given to me was that a composer's songs would remain in his or her family and that they would, one day, become the property of the children and their children after them. It never occurred to me that these songs would fall into the public domain while my grandchildren are still teenagers or young adults. Yet this is exactly what will occur if [the CTEA] is not enacted." *Copyright Term Extension Act of 1995: Hearing on H.R. 989 before the House of Representatives Judiciary Courts and Intellectual Property Comm. Comm.* (statement of Bob Dylan) 1995 W.L. 418349 (F.D.C.H.).

Alan Menken further noted:

> ". . . the sad reality [is] that once works fall into the public domain, the families of the creators have no incentive to maintain the works in a format that is useful to the public. Most of the estates represented by AmSong maintain extensive archives that are not only sources of

information for scholars, but also serve as cultural resource centers for the public, anxious to perform a special piano concerto by George Gershwin or an orchestral arrangement by Leonard Bernstein. It is the public who will wind up losing if an unreasonably short copyright term puts the archives of these master songwriters out of business." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Alan Menken) 1995 W.L. 557177 (F.D.C.H.).

Quincy Jones also noted:

> "My songs are my legacy to my children. Because my pre-1978 works, which represent at least 40% of my catalogue, are only protected for a fixed term of 75 years from registration, my catalogue will begin to fall into the public domain when my youngest child is only 30 years old. Without an extension of the current copyright period, my children - - my most immediate successors - - will be deprived of their legacy from me while they are still young adults. I have no desire to see my children be denied that which I intended for them.
>
> Fortunately, I have written well over 400 songs in my lifetime. But we must not forget that there are many songwriter/musicians, particularly blues and jazz musicians, who support themselves and their families on the royalties earned from the three or four songs that they composed. An extended term of copyright will make an acute difference in the quality of life for these artists." *Copyright Term Extension Act of 1995: Hearing on H.R. 989 before the*

House of Representatives Judiciary Courts and Intellectual Property (statement of Quincy Jones) 1995 W.L. 418350 (F.D.C.H.).

E. Randol Schoenberg, grandson of Arnold Schoenberg, added:

> "My grandfather, the world-renowned Austrian-American composer, Arnold Schoenberg, came to this country in 1933 after being forced by the Nazis to abandon his position as the leading composition teacher at the Academy of Arts in Berlin, Germany. He worked and taught in Boston and New York, and from 1934 until his death in 1951, in Los Angeles, where my family still resides. After his death, UCLA named its music building Schoenberg Hall in his honor, and USC built the Arnold Schoenberg Institute to house his archives. He is generally considered to be the most important and influential composer of the twentieth century, and is called by some the "father of modern music."
>
> We are informed that, notwithstanding its longer copyright term, the European Community has decided not to recognize the copyrights of American authors and composers beyond the term for protection provided in the United States. If this "rule of the shorter term" were applied to my grandfather's works, many of them might lose their copyright protection in the year 2001.
>
> As you might imagine, our family receives a large portion of our royalty income from

European performances. It would be a tremendous loss for us if in 2001 the European Community stopped protecting my grandfather's landmark American works, such as Violin Concerto, the Piano Concerto, and "A Survivor from Warsaw" (which was performed at the opening of the Holocaust Museum in Washington, D.C.).

The extension of the copyright term will assist the families who are the intended beneficiaries of the copyright term. Despite his importance in the field of music, my grandfather died in 1951 with few assets aside from his artistic works." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of E. Randol Schoenberg) 1995 W.L. 557176 (F.D.C.H.)

Shana Alexander, a noted author in her own right, and daughter of Milton Ager, stated:

> "My father Milton Ager, a lifelong songwriter, well understood the importance of copyright. His first compositions were copyrighted in 1910, before he finished high school, and his last in 1979, the year of his death at the age of 85. In a family such as ours, intellectual property is the only property. In the nation as a whole, it is — I am told — the second-largest export. Hence failure to properly protect our intellectual property in the international marketplace will result in an unfavorable trade balance for the United States. Furthermore, it appears to me monstrously unfair that other recognized forms of property — lands, businesses, and so on — can be handed down

> indefinitely, so long as proper taxes are paid, whereas the value of intellectual property under our present copyright laws arbitrarily is cut off 75 years after it was created." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Shana Alexander) 1995 W.L. 557155 (F.D.C.H.)

Ellen Donaldson, who manages her father's copyright interest in the family business, Donaldson Publishing Co., stated:

> "I believe the intent was that the term of copyright should be enlarged to cover the lifetime of the author and his immediate family. Yet here we are, my father's immediate family: my mother, in her 80's; my sister, 59; and me, 55 ... all going strong, running a thriving publishing business, and facing a daunting prospect: the loss of our copyrights upon which our business is based. Surely the issue of current life expectancy must be reconsidered; yet another reason for much needed moratorium until a final decision is made on extension of term.
>
> The current 'market' is very healthy indeed for the old songs. I would venture a guess that it will continue to be healthy for at least another 20 years. The songs, because they are good, will continue to be used. Artists will be paid for recording them, records will be sold, vintage records will continue to be re-mastered, re-issued and sold, record companies will be paid, the stores selling the recordings will make money, an ad agency will use a song to sell its clients' products, a motion picture company will include it on a soundtrack to help sell tickets. But the creator's share, meant, according to the intent of the 1976 copyright law, for his heirs, will be left out. Everyone will benefit from the

> creator's work except his heirs." Letter from Ellen Donaldson, Vice President, AmSong, Inc., to Barbara Ringer, Acting Registrar of Copyrights (1994).

The testimony of Ginny Mancini, widow of "Moon River" author, Henry Mancini:

> "My husband always intended that his work would be a legacy for his children. Indeed, our children are actively involved in the business aspects of my husband's catalogue and ensuring that his works continue to be available to the public. It is inconceivable that such works would go into the public domain at a time when our children will most need the support form the copyrights left to them by their father. It is particularly egregious because foreign works written contemporaneously with my husband's works will continue to be protected for 70 years beyond the author's death." *Copyright Term Extension Act of 1995: Hearing on S. 483 before the Senate Judiciary Comm.* (statement of Ginny Mancini) 1995 W.L. 557156 (F.D.C.H.)

Congress has protected the interests of songwriters' heirs in the past. Under the Copyright Act of 1909, which governed musical compositions until the passage of the Copyright Act of 1976, the duration of protection was for 28 years from the first date of registration or publication and was renewable for an additional 28 years. Under the 1976 Act, this second term of copyright, i.e., the renewal term, was automatically extended for pre-1978 works from 28 years to 47 years. In addition to this 19-year extension, Congress gave the author and his heirs a valuable termination right for copyrights in their initial *or* renewal term of transfers or licenses executed before January 1, 1978. This termination right was enforceable by the author or

his or her heirs even if they had given away the termination right in a prior agreement (provided that such agreement was executed before rights vested in the author or his heirs). Thus, Congress intended that heirs of songwriters recapture the income from songs created by previous generations.

Conclusion

The extensions of the term of copyright by Congress reflect a consistent and proper exercise of congressional judgment that a creator's works should enjoy an extended term of copyright protection. Petitioners seek by their petition to override that considered judgment and to impose restrictions that would preclude a grant of additional rights in existing works. This request is neither supported by precedent nor by the Constitution. Petitioners' legal position seeks to effectively overturn two centuries of consistent constitutional understanding and practice.

The statements made to Congress by the actual creators of the "useful arts and science" show most eloquently that the copyright laws envisioned by the framers of the Constitution, and the term extension as implemented by Congress, does exactly what was intended by ". . . securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."

For the reasons set forth above, the decision of the District Court of Columbia Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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RECORD AND BRIEFS

No. 01-618

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* SYMPHONIC AND CONCERT COMPOSERS JACK BEESON, CHEN YI, JOHN CORIGLIANO, JOHN DUFFY, HAROLD FARBERMAN, PHILIP GLASS, ADOLPHUS HAILSTORK, JENNIFER HIGDON, LIBBY LARSEN, TANIA LEÓN, STEPHEN PAULUS, GEORGE ROCHBERG, NED ROREM, AUGUSTA READ THOMAS, MELINDA WAGNER AND RICHARD WERNICK IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 01-618

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTERESTS OF *AMICI CURIAE* [1]

Jack Beeson, Chen Yi, John Corigliano, John Duffy, Harold Farberman, Philip Glass, Adolphus Hailstork, Jennifer

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part. The only entity, other than the named *amici curiae* and their counsel, to make a monetary contribution to the preparation and submission of this brief is the American Society of Composers, Authors and Publishers (hereinafter "*ASCAP*").

Higdon, Libby Larsen, Tania León, Stephen Paulus, George Rochberg, Ned Rorem, Augusta Read Thomas, Melinda Wagner and Richard Wernick submit this brief as *amici curiae* in support of Respondent pursuant to Rule 37 of the Rules of the Court. All of the *amici* are distinguished composers of symphonic and concert (sometimes called "serious" or "classical") music, and include four Pulitzer Prize winners and Oscar, Golden Globe, Emmy and Grammy winners.

Jack Beeson is best known for his works, *Hello Out There*, a one act chamber opera produced by the Columbia Theater Associates in 1954, and *Lizzie Borden*, commissioned by the Ford Foundation for the New York City Opera and premiering in 1965. He is presently MacDowell Professor of Music Emeritus at Columbia University, where he taught for half a century.

Chen Yi was born in China. After a period of enforced labor during the Cultural Revolution (during which time classical music was forbidden), she became a concertmaster and composer with the Beijing Opera Troupe. She continued her studies in the United States, receiving her Doctor of Musical Arts degree from Columbia University in 1993. She has been appointed Composer-in-Residence for the Women's Philharmonic, Chanticleer and the Aptos Creative Arts Program in San Francisco, and has taught at the Peabody Conservatory and the UMKC Conservatory (as Cravens/Millsap/Missouri Distinguished Professor in Composition). In 2001, she received the Ives Living Award (2001-2004) from the American Academy of Arts and Letters. She also has received the Lili Boulanger Award and the CalArts Alperts Award for Music, fellowships from the Guggenheim Memorial Foundation, the American Academy of Arts and Letters, and grants from the National Endowment for the Arts, the Mary Flagler Cary Charitable Trust, the Fromm Music Foundation and the Koussevitzky Foundation.

John Corigliano won the Oscar in 2000 for best film score for *The Red Violin*, and the Pulitzer Prize for his *Symphony No. 2* in 2001. *Symphony No. 1*, Corigliano's personal response to the AIDS crisis, won music's Nobel Prize—the 1991 Grawemeyer Award for Best New Orchestral Composition.

John Duffy, among his numerous other awards, has won two Emmys, an ASCAP award for special recognition in film and television music, a New York State Governor's Art Award and the (New York City) Mayor's Award of Honor for Arts and Culture. He is founder of Meet the Composer, an organization dedicated to the creation, performance, and recording of music by American composers.

Harold Farberman's very first work, *Evolution*, written in 1954, has been recorded four times, once by Leopold Stokowski. In 1956 his *Quartet for Flute, Oboe, Viola and Cello* received first prize in the New England Composer's Competition. In 1957 *Greek Scene* was chosen to represent the United States in an International Composer's Symposium held in Paris. For his dedication to the music of Charles Ives through performance and recordings, Farberman was awarded the Ives Medal. He is the founder of the Conductors Guild and also created the Conductors Institute, the premiere training ground for young conductors from around the world.

Philip Glass has collaborated with a variety of artists in a range of media including opera (*Satyagraha, Akhnaten, The Making of the Representative for Planet 8, The Fall of the House of Usher, Hydrogen Jukebox and The Voyage*), film (*Koyaanisqatsi, Mishima, Powaqqatsi, A Brief History of Time, Candyman, The Thin Blue Line, Kundun, Dracula, The Truman Show*), dance (*A Descent into the Maelstrom, In the Upper Room*), theatre works (*The Photographer, 1000 Airplanes on the Roof, The Mysteries, What's so Funny?, Orphée, La Belle et La Bête, Les Enfants Terribles*), cooperative recording projects (*Songs from Liquid Days,*

Passages), orchestral works (*Itaipu, Symphony No. 2, Symphony No. 3, the "Low" and "Heroes" symphonies, Symphony No. 5—Requiem, Bardo and Nirmanakaya*). In 2000, he was awarded the George Peabody Medal for Outstanding Contributions to Music in America. His original music for the *Truman Show* won a Golden Globe award for Best Score in 1999.

Adolphus Hailstork's *Out of the Depths* won the 1997 Belwin-Mills Max Winkler Award presented by the Band Directors National Association; his *American Guernica* received first prize in the Virginia College Band Directors' 1983 national contest; and *Mourn Not the Dead* received the 1971 Ernest Bloch Award for choral composition. He is a Professor of Music and Eminent Scholar at Old Dominion University.

Michael Hersch has received the American Composers Prize (1997), the Guggenheim Fellowship (1997), the Prix de Rome (2000) and the Berlin Prize (2001). He also has received awards from the American Academy of Arts & Letters, the New York Youth Symphony's First Music prize, two Meet the Composer grants, three ASCAP Young Composer Awards and five ASCAP Foundation grants. He was selected as the Pittsburgh Symphony Orchestra's Composer of the Year for the 2002-2003 season.

Jennifer Higdon's work, *Shine* (commissioned by the ASCAP Foundation), was named Best Contemporary Piece of 1996 by *USA Today* in their year-end classical picks. She has received awards from the Guggenheim Foundation, the American Academy of Arts & Letters, the Pew Fellowship in the Arts, the International League of Women Composers, Composer, Inc., the University of Delaware New Music Competition, the Louisville Orchestra New Music Search, the Cincinnati Symphony's Young Composer's Competition, NACUSA, and ASCAP. She has received grants from the

National Endowment for the Arts, Meet-the-Composer, and the Pennsylvania Council on the Arts. She is currently on the composition faculty of the Curtis Institute of Music.

Libby Larsen has received numerous awards, including a 1994 Grammy as producer of the CD *The Art of Arleen Augér*, an acclaimed recording that features Larsen's *Sonnets from the Portuguese*. Her opera *Frankenstein, The Modern Prometheus* was selected as one of the eight best classical music events of 1990 by *USA Today*. She was the first woman to serve as a resident composer with a major orchestra, and has held residencies with the California Institute of the Arts, the Arnold Schoenberg Institute, the Philadelphia School of the Arts, the Cincinnati Conservatory, the Minnesota Orchestra, the Charlotte Symphony and the Colorado Symphony. In 1973, she co-founded (with Stephen Paulus) the Minnesota Composers Forum, now the American Composers Forum.

Tania León was born in Havana, Cuba and came to the United States in 1967. She became a founding member and the first musical director of the Dance Theatre of Harlem in 1969. Her orchestral work *Horizons* was written for the NDR Symphony Orchestra in Hamburg and was premiered there in July 1999. Her opera *Scourge of Hyacinths* was commissioned by the Munich Biennale in 1994, where it won the BMW Prize as best new work of opera theatre. She has received awards for her compositions from the American Academy of Arts and Letters, the National Endowment for the Arts, Chamber Music America, the Lila Wallace/Reader's Digest Fund, NYSCA, ASCAP, and Meet the Composer, among others. She is a Professor of Music at Brooklyn College.

Stephen Paulus' opera, *The Postman Always Rings Twice* was the first American opera to be performed at the Edinburgh Festival. He has written five other operas and has received Guggenheim and NEA Fellowships, as well as

commissions from the New York Philharmonic, Cleveland Orchestra, Juilliard Opera Center, The Festival Singers and many others. He is co-founder and a current Board Vice President of the American Composers Forum, the largest composer service organization in the world.

George Rochberg's 1971 *Third String Quartet* was critically acclaimed by the *San Francisco Examiner* as "the work that defines the attitudes of a generation of composers." He is the recipient of numerous awards, grants and fellowships, including the Alfred I. du Pont Award for Outstanding Conductors and Composer (Delaware Symphony), Elected Fellow of the American Academy of Arts and Sciences, the Gold Medal Brandeis Creative Arts Award, the American Academy of Arts and Letters, First Prize Kennedy Center Friedheim Award, two Guggenheim Fellowships, the George Gershwin Memorial Award, and the Fulbright Fellowship. He taught at Curtis Institute of Music from 1948 to 1954. In 1960, he joined the faculty of the University of Pennsylvania, where he served as chairman of the Department of Music until 1968. He retired from teaching in 1983 as Emeritus Annenberg Professor of the Humanities.

Ned Rorem's suite *Air Music* won the 1976 Pulitzer Prize in music. The Atlanta Symphony recording of the *String Symphony, Sunday Morning*, and *Eagles* received a Grammy Award for Outstanding Orchestral Recording in 1989. He has been the recipient of a Fulbright Fellowship (1951), a Guggenheim Fellowship (1957), and an award from the National Institute of Arts and Letters (1968).

Augusta Read Thomas has received numerous prizes and awards from, among others, ASCAP, BMI, the National Endowment for the Arts, the American Academy and Institute of Arts and Letters, the John Simon Guggenheim Memorial Foundation, the Koussevitzky Foundation, the New York Foundation for the Arts, the John W. Hechinger

Foundation, the Kate Neal Kinley Foundation, The Debussy Trio Music Foundation and Thomas van Straaten, Columbia University (Bearns Prize), the Naumburg Foundation, the Fromm Foundation, the Barlow Endowment, Harriett Eckstein, the New York State Council for the Arts, and Chamber Music America. She was the recipient of the Third Century Award from the Foundation for a Creative America. She received fellowships from the Bunting Institute of Radcliffe College, the Rockefeller Foundation (Bellagio), the International Rotary Foundation, L'Ecole Normal in Fountainbleau, France, Tanglewood Music Center, the Gaudeamus Foundation, the Wellesley Composers Conference, and the Atlantic Center for the Arts and the Aspen Music Festival. She is currently a Professor on the composition faculty at Northwestern University and the Composer-in-Residence of the Chicago Symphony Orchestra.

Melinda Wagner was awarded the Pulitzer Prize in music in 1999 for her *Concerto for Flute, Strings, and Percussion*, and her works have been performed by the Chicago Symphony Orchestra, American Composers Orchestra, the Chamber Music Society of Lincoln Center, the New York New Music Ensemble, and the Society for New Music. She is the recipient of numerous honors including fellowships from the Guggenheim Memorial Foundation and the Howard Foundation (Brown University), grants from the Illinois Arts Council and the New York State Council on the Arts, three ASCAP Young Composer Awards, and resident commissions from the Barlow Foundation, the Mary Flagler Cary Charitable Trust, the Fromm Foundation (Harvard University), and the Ernst and Young Emerging Composers Fund.

Richard Wernick is Professor Emeritus of the University of Pennsylvania. He received the 1977 Pulitzer Prize in music. From 1983 to 1989, he served as the Philadelphia Orchestra's Consultant for Contemporary Music, and from 1989 to 1993 served as Special Consultant to Music Director,

Riccardo Muti. He is the only two-time first prize Friedheim Award recipient, and has been honored by awards from the Ford Foundation, Guggenheim Foundation, National Institute of Arts and Letters, and the National Endowment for the Arts.

SUMMARY OF ARGUMENT

The experience of centuries of musical history testifies to one of the most unhappy realities of symphonic and concert music: a delay of acceptance and recognition, not to say remuneration, typically for decades. Our modern musical era has been no exception; most composers of symphonic and concert music today live in relative obscurity and economic need while creating their life's work, and only close to death or after death do they or their heirs start to reap acknowledgment and compensation for their works.

By extending copyright protection for new and existing works, the Sonny Bono Copyright Term Extension Act of 1998 ("*CTEA*"), Pub. L. No. 105-298, 112 Stat. 2827, provides composers of symphonic and concert music the increased assurance that, even accounting for longer lifespans and having children later in life, the musical legacy they leave behind will at least provide sustenance for their spouses, their children and their grandchildren.

The CTEA's extension of copyright protection for *existing* works also acts to promote the creation of *new* works of symphonic and concert music by emerging composers, because these creators rely on awards, grants, scholarships and fellowships for financial support. Countless such awards are funded by royalties collected for older, established works of symphonic and concert music. The CTEA ensures that such funding will continue for a reasonable time.

The CTEA further enriches the American musical heritage by affording the heirs of symphonic and concert composers and those who in invest in their works critical additional time

to promote and disseminate the composers' life work to the public—a promotion and dissemination which otherwise might not occur.

All of these facts were presented to Congress as it considered the CTEA. Congress measured the testimony and statements of numerous individuals and entities that emphasized the need to compensate creators of serious works of art (including works of symphonic and concert music), encourage the investment in and further dissemination of existing works, and promote the creation of new works. These facts, and the many others Congress considered, leave no doubt that the CTEA's extension of copyright protection to existing works does indeed "Promote the Progress of Science and useful Arts." *See* U.S. Const. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

ARGUMENT

I. RECOGNITION OF, AND REMUNERATION FOR, THE LIFE WORK AND LEGACY OF CREATORS OF SYMPHONIC AND CONCERT MUSIC IS USUALLY LONG-DELAYED

Professionals in the creative arts consistently struggle with the very real possibility that their life's work may never be recognized during their lifetimes. Artistic creators run this risk nonetheless, often sacrificing economic enrichment for themselves in hopes that their creations may someday provide for their heirs. This is particularly true for composers of symphonic and concert music. Centuries of history stand witness to their particular plight. Countless composers from the past, today considered the Great Masters of classical music, died in relative obscurity (and often times, poverty), and were not fully recognized in the repertoire until long after their deaths.

History is replete with examples of symphonic and concert usical works that were originally greeted with scathing iticism, yet later accepted as masterpieces. Consider the llowing concerning the derision which first greeted Stransky's *Rite of Spring*, and the forty years it took to cognize this masterpiece:

> A fairly accurate time-table could be drawn for the assimilation of unfamiliar music by the public and the critics. It takes approximately twenty years to make an artistic curiosity out of a modernistic monstrosity; and another twenty to elevate it to a masterpiece. . . . With what precision the law of a forty-year lag in the integral acceptance of a modern masterpiece operates, was demonstrated by the wild cheers that greeted Stravinsky at the performance of *Le Sacre du Printemps* in Paris on May 8, 1952, thirty-nine years after its première. Pierre Monteux, who conducted both performances, in 1913 and in 1952, remarked: "There was just as much noise the last time, but of a different tonality."

ICOLAS SLONIMSKY, LEXICON OF MUSICAL INVECTIVE: RITICAL ASSAULTS ON COMPOSERS SINCE BEETHOVEN'S ME 19 & n. (2d ed. 1978).

The American public is equally slow to recognize its major ntributors to the repertoire of symphonic and concert usic. An example is the life work of Charles Edward Ives 874-1954), now considered one of America's greatest asters of symphonic and concert music, whose works were t taken seriously until a decade after his death:

> [Charles Ives'] [e]arly works include the precocious *Variations on "America"* for organ, written at seventeen; it would find considerable popularity after Ives died. . . . His epic *First Piano Sonata*, begun in 1901, was the first large-scale work in his radical vein, and cost him at least eight years of effort. It would not find its premiere until 1949. . . . [D]uring his years of obscurity Ives constantly showed his work to musicians,

> hired groups to play over pieces, revised the music based on what he heard, and had much of his music expertly copied. Yet, for twenty years the nearly unanimous reaction of musicians to his music was somewhere between laughter and outrage. It is no wonder that he required, as Aaron Copland put it, "the courage of a lion." . . . Charles Ives died in May 1954. . . . It was not until a decade later that the musical mainstream really began to take Ives seriously.

Jan Swafford, "Charles Ives: A Life With Music" (1998), *available at* http://www.charlesives.org/02bio.htm.

The delay in recognition of symphonic and concert composers' works continues to this day. That delay means not only a delay in compensation for the composer and his or her heirs, but also a delay in return to the music publisher who invests in such works and supports the composer for those long years. Edward P. Murphy of the National Music Publishers' Association echoed the observations of Pierre Monteux in his 1995 testimony before Congress, advocating passage of the CTEA:

> [M]uch serious music gains little public exposure or acceptance until many years after its creation. For example, the famous Barber composition, "Adagio for Strings," experienced only modest economic success following its debut in 1939. It became popular 25-years later, however, when the piece was used in connection with the funeral of President Kennedy. Another Barber work, an opera, "Anthony and Cleopatra," premiered in 1966, but was not performed or recorded again until 1991. This cycle of earnings which is typical of serious and classical works means that a composition, which may some day be recognized as an American classic may not return a profit to the creator's descendants or to the music publisher owner within the current term of copyright protection. . . .

Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248 and H.R. 1734

Before the House Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary, 104th Cong. (hereinafter "*1995 House Hearing*") 76-77 (1995).

A more recent example of this phenomenon is now world-renowned composer (and *amicus* on this brief) Philip Glass, whose work in the late 1970s and 1980s was greeted with "frantic bravos and violent boos, sometimes coming from the same people. Not since the days of the young Stravinsky had a music appeared that so engaged the emotions of the people who heard it. While many were hailing Glass as the man who had revitalized music and made opera a viable art form again, just as many were castigating him for 'destroying' music." Robert T. Jones, *Introduction*, *at* http://www.philipglass.com/.

George David Weiss, composer of "What a Wonderful World" and "The Lion Sleeps Tonight," testified before Congress regarding fair compensation to the artistic creators who enrich our culture. He noted that many composers—and not merely those who write "serious" music—do not achieve public recognition or financial reward until after their death:

> There are innumerable composers whose works never reach the pinnacle of public recognition until after their death. Herman Hupfeld ("As Time Goes By"), Vincent Youmans, and Charles Ives are just three examples. Whether it is because their music is *avant garde*—or out of synch with what is currently popular—such artists toil in obscurity for most of their creative days. And suddenly, after their death, public recognition and financial rewards abound. Too late for the creator, but in time to nourish their heirs - if the duration of protection is sufficient. What was lost to the creator should not be also lost to his or her heirs. . . . If we are to encourage creativity, at a minimum we must offer to the thousands of my colleagues who struggle to earn a living in this difficult and competitive business the reasonable prospect that they can leave a legacy to their children and grandchildren—even if their compositions do not become commercially viable for many years.

The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Comm. on the Judiciary, 104th Cong. (hereinafter "*1995 Senate Hearing*") 142-43 (1995).

II. THE CTEA RATIONALLY PROMOTES THE PROGRESS OF SCIENCE AND USEFUL ARTS BY ALLOWING FOR FAIR COMPENSATION AND ENCOURAGING CREATIVITY, INVESTMENT, PRESERVATION, PROMOTION AND DISSEMINATION IN FIELDS IN WHICH AN ARTIST'S WORK IS RECOGNIZED VERY LATE IN LIFE OR POSTHUMOUSLY

A. The CTEA Provides Fair Compensation for the Enrichment of American Culture through Symphonic and Concert Musical Works

Once accepted into the repertoire, works of symphonic and concert music enrich our culture and the lives of those who enjoy the music—the very essence of the constitutional goal of "promotion of progress" in our culture. Those who create such enrichment for the public good should be justly compensated with the assurance of an adequate copyright term.[2] For most symphonic and concert music composers, a

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[2] *See* S. REP. NO. 104-315, at 3 (1996) ("[The CTEA] will ensur[e] fair compensation for American creators, who deserve to benefit fairly from the exploitation of their works."); *id.* 11-12 ("[I]ntellectual Property is the only form of property whose ownership rights are limited to a period of years, after which the entire bundle of rights is given as a legacy to the public at large. In balancing these competing interests, Congress has sought to ensure that creators are afforded ample opportunity to exploit their works throughout the course of the works' marketable lives, thus maximizing the return on creative investment and strengthening incentives to creativity.").

copyright term sufficient in length *following* their death is the only means, albeit posthumous, of fair compensation for their life's work.

To provide creators of artistic works fair compensation for their contributions to American culture, the copyright term has historically been intended to cover the life of the author plus two generations. *See* H.R. REP. NO. 105-452, at 4 (1998). Due to increases in life expectancy and a delay in procreation until later in life, however, the copyright term provided by the 1976 Copyright Act fell short of this goal—approximately 20 years short. This was the inequity Congress was asked to, and did, remedy through the CTEA:

> Now certainly, there has been a minor increase in life expectancy in the United States since the duration provisions of the 1976 Act were proposed in the early 1960s, and enacted in 1976. . . . But the relation of life expectancy to copyright term should not be made by comparing the life-plus-50-years term and life expectancy in 1976 or 1964 with a life-plus-70-years term and life expectancy in 1990 or 1995. Rather, we must realize that life-plus-50-years was the international norm at the beginning of this century. Thus the increase in life expectancy over the 20th Century (from about 52 years in 1909-1911 to about 76 years now) should be reflected in an increase from the international life-plus-50-years norm at the beginning of the century to a life-plus-70-years term now. . . . [T]he life-plus term is also designed to protect the next two generations of the author's heirs. Extended copyright term is necessary to achieve adequate protection for the author's heirs, during the additional years they, too, are expected to live.

1995 Senate Hearing 134 (Joint Statement of the Coalition of Creators and Copyright Owners). Congress specifically recognized this fact when it enacted the CTEA. *See* S. REP. NO. 104-315 at 11 (1996) ("The Register of Copyrights informed the Committee that even for . . . works [that] are

afforded the basic life-plus-50 term of protection, the current term has proven insufficient in many cases to protect a single generation of heirs.") (citing Testimony of Marybeth Peters, Register of Copyrights and Associate Librarian of Congress for Copyright Services, *1995 Senate Hearing* 22).

Thus, the CTEA merely updated the copyright term to account for current life expectancy and child bearing patterns, ensuring that fair compensation for both existing and new works, especially to the heirs of composers of symphonic and concert music, would not fall short of two generations. *See 1995 Senate Hearing* 2 (Opening Statement Sen. Hatch) ("When we so often see copyrights expiring before even the first generation of an author's heirs have fully benefited from them, then I believe it is accurate to say that our term of copyright is too short.").

B. The CTEA Promotes American Culture by Extending Copyright for Existing Symphonic and Concert Music

Congress specifically recognized that the CTEA promoted progress in culture in two ways: First, by providing an incentive for the creation of new works; and second, by extending protection for existing works which then supports further creativity, investment and dissemination.

> [T]he basic functions of copyright protection are best served by the accrual of the benefits of increased commercial life to the creator for two reasons. First, the promise of additional income will increase existing incentives to create new and derivative works. *The fact that the promise of additional income is not realized for many years down the road does not diminish this increased creative incentive. One of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and*

grandchildren. . . . Second, extended protection for existing works will provide added income with which to subsidize the creation of new works.

S. REP. NO. 104-315 at 12 (1996) (emphasis added).

1. *The CTEA Ensures a Proper Legacy to the Composer's Heirs*

Beyond fair and just compensation for themselves (which too often is illusory), the expectation that the copyright term will provide a potential legacy for their children and grandchildren gives symphonic and concert composers a significant incentive to create. The CTEA's extension of copyright term for existing works further bolsters this incentive, assuring symphonic and concert composers that the creative legacy they leave may someday benefit their heirs. E. Randol Schoenberg (grandson of Austrian-American composer Arnold Schoenberg[3]) testified from personal experience about the importance of a fair post-mortem copyright term to serious music composers:

> My grandfather, the world-renowned Austrian-American composer, Arnold Schoenberg, came to this country in 1933 after being forced by the Nazis to abandon his

[3] Arnold Schoenberg is one of the composers, now recognized as a master of the classical music genre, who was subject to vituperative criticism when his works debuted. One of many critics said at the time of a now highly-regarded work:

> I must reject completely the five orchestral pieces of 1909. . . . These sounds conjure up hideous visions; monstrous apparitions threaten—there is nothing of joy and light, nothing that makes life worth living! How miserable would our descendants be, if this joyless gloomy Schoenberg would ever become the mode of expression of their time! Is this destined to be the art of the future????

NICOLAS SLONIMSKY, LEXICON OF MUSICAL INVECTIVE: CRITICAL ASSAULTS ON COMPOSERS SINCE BEETHOVEN'S TIME 150 (2d ed. 1978) (quoting Hugo Leichtentritt, *Signale*, Berlin, Feb. 7, 1912).

> position as the leading composition teacher at the Academy of Arts in Berlin, Germany. . . . He is generally considered to be the most important and influential composer of the twentieth century, and is called by some the "father of modern music.". . . Despite his importance in the field of music, my grandfather died in 1951 with few assets aside from his artistic works. He left behind my grandmother and three young children (ages 10, 14 and 19) who survived primarily on copyright royalties. . . . For my grandfather, as with most serious composers today, the prospect of performances and recognition after his death was his only hope of compensation and support for his young family. Had he not had faith in the ability of his copyrights to support his family, he would not have been able to devote the time that his groundbreaking work required. Certainly, [the CTEA] will be a further inspiration to those artists creating today, whose works are also not likely to receive their due during their lifetime.

1995 *House Hearing* 265 (Statement of E. Randol Schoenberg).

2. *Royalties from Existing Works Support Emerging Composers and Their New Works*

Not all royalties from existing works stay within the composer's family.[4] Many composers donate or bequeath the royalties from their works to benefit others in their field, especially those just starting out. Consequently, the extension of the copyright term for existing works promotes the creation of new symphonic and concert musical works by providing composers breaking into the field with the financial support needed to persevere in a discipline known for its

[4] A notable example of an accomplished composer whose royalties benefit others is Irving Berlin, who donated the royalties from *God Bless America* to a charitable trust, which conveys them to the Girl and Boy Scouts of America. *See American Treasures of the Library of Congress, God Bless America, at* http://www.loc.gov/exhibits/treasures/trm019.html.

unforgiving remunerative nature. Without aid from outside sources, many who would otherwise devote themselves to composing new works would turn away from their creative work so as to provide for themselves and their families, contravening the economic purpose of the Copyright Clause:

> If [Charles Ives] had continued on the career path of an organist/choirmaster/composer/teacher like Horatio Parker, Ives would have gone from Yale to complete his studies in a European, probably German, conservatory. Instead, he took a path that led him into one of the most difficult and unconventional lifestyles of any major composer: acting on some of his father's last words of advice, Ives decided to forego a musical career and go into business. When he left Yale in 1898, he headed for New York to begin as a $15-a-week clerk with the Mutual Lif Insurance Company. . . . As Ives put it, if a composer "has a nice wife and some nice children, how can he let them starve on his dissonances?"

Jan Swafford, "Charles Ives: A Life With Music" (1998), *available at* http://www.charlesives.org/02bio.htm.

This all-too-familiar economic and professional dilemma has led to the creation of foundations, awards, grants and fellowships—all funded, in full or in part, by the royalties from existing works—which support emerging composers of symphonic and concert music. The ASCAP Foundation, for example, reinvests donated royalties from existing works and other charitable contributions to fund awards, grants, scholarships and fellowships to emerging composers of symphonic and concert music. Among the ASCAP Foundation's awards, grants, fellowships and composer-in-residence programs providing resources for emerging composers are: The Morton Gould Young Composers Award, The Leo Kaplan Award, The New Horizons Award, The Sammy Cahn Award, The Rudolf Nissim Prize, The Young Jazz Composer Awards, The R&B Music Initiative, The Leonard Bernstein Composers Fund, The Leonard Bernstein Composer Fellowship at

Tanglewood, The Fellowship for Film Scoring & Composition at Aspen, The New York University Film Studies Fellowship in Florence, Italy, The ASCAP Foundation Commissioning Program, The Berklee College of Music Composer-in-Residence, The New York Philharmonic Education Program, The Metropolitan Opera Composer-in-Residence and The New York City Opera Composer-in-Residence. The ASCAP Foundation also awards numerous scholarships and grants to support musical composition students and musical education in various schools and summer camps and in fellowships and composer-in-residence programs. The ASCAP Foundation provides hundreds of thousands of dollars annually to emerging musical artists. *See ASCAP Concert Music: Programs Administered by ASCAP's Concert Music Department, at* http://www.ascap.com/concert/programs.html.[5] None of these programs would have been possible without the donation of royalties earned by existing works.

There are also many examples of individual composers who have bequeathed their royalties from existing works to support emerging artists. Aaron Copland, for instance, left virtually all of his estate to The Aaron Copland Fund for Music, Inc., which operates grant programs to encourage and improve public knowledge of contemporary American concert music and jazz. Since 1992, the Copland Fund has awarded more than $9 million to encourage and improve support for the recording, performance and other dissem-

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[5] The ASCAP Foundation is not alone in its assistance to musical composers. Other foundations reinvest royalties from existing works to aid emerging musical artists. For instance, the Kurt Weill Foundation for Music is funded entirely by royalties earned from the musical works of Kurt Weill and related literary and other rights, and uses such royalties to fund numerous activities that provide creative opportunities for new artists, including grants and awards such as the "Award for New Musical Theater" to encourage composers of new musical theater works. *See Kurt Weill Foundation for Music, at* www.kwf.org.

ination of American music, both in the United States and around the world. *See The American Music Center, AMC Grant Programs, The Aaron Copland Fund for Music Performing Ensembles Program Guidelines, at* http://www.amc.net/resources/grants/performing.html. Virgil Thomson also left the entire proceeds of his estate to the Virgil Thomson Foundation to provide assistance to concert music projects, particularly those involving contemporary American concert music. Charles Kingsford, Frank Proto and Irwin Bazelon left their estates to the ASCAP Foundation for the purpose of encouraging and assisting the efforts of emerging composers. *See The ASCAP Foundation: Where Music Grows, The ASCAP Foundation Timeline, at* http://www.ascapfoundation.org/timeline2.html (Charles Kingsford as major supporter). Dizzy Gillespie left his estate to a fund that reimburses the medical expenses of indigent jazz musicians. *See Englewood Hospital and Medical Center, at* http://www.englewoodhospital.com/Pages/dizzyGCI.html.

3. *Royalties from Existing Works Encourage Composers' Heirs and Others to Invest in, Promote and Disseminate Their Works*

Modern digital recording technology has made possible the permanent preservation of the American musical legacy. That, in turn, allows for increased investment in the dissemination of that legacy. In the case of symphonic and concert music, the heirs of composers, and their music publishers, most often take on the responsibility of preserving, promoting and disseminating the musical repertoire that was left behind. The CTEA provides these heirs (and investors) with the crucial incentive of an additional 20 years to take advantage of the gifts of the digital revolution in investing in and promoting their parents' or grandparents' creations. E. Randol Schoenberg testified:

> Today, our family continues to spend a great deal of time and energy promoting my grandfather's works and protecting his cultural legacy which is a treasured asset of the City of Los Angeles. My generation, the grandchildren, span from age 17 to 35. It would be a great loss if our family were not now able to reap the benefits of my grandfather's life's work, just as those benefits are coming to fruition. In serious music, even 70 years after death is sometimes insufficient. J.S. Bach's music had to wait almost 100 years after the composer's death before Felix Mendelsson "discovered" it and proclaimed its greatness to the world.

1995 Senate Hearing 65 (Statement of E. Randol Schoenberg).[6] The CTEA provides composers' heirs and others with an additional 20 years to invest in and promote works of American culture.

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[6] *See also 1995 Senate Hearing* at 58 (Statement of Mrs. Henry Mancini) ("My husband always intended that his work would be a legacy for his children. Indeed our children are actively involved in the business aspects of my husband's catalogue and insuring that his works continue to be available to the public."); *id.* at 60 (Statement of Ellen Donaldson, daughter of Walter Donaldson) ("My point is: [My father's works are] [s]till used, still there. After all these years. Not lost somewhere in 'cyberspace'. It is a small piece of the jigsaw puzzle of distinctly American intellectual property that helps define our national culture. It has been protected and promoted and always available. It has been a benefit to my mother, my sister and to me, as my father's direct heirs. . . ."); *id.* at 63 (Statement of Marsha Durham, daughter of African/Indian American composer, Eddie Durham) ("[A]fter many years of arduous research I am finally in the process of recapturing the rights to [my father's] songs for the final 19 years of copyright protection available under the 1976 Copyright Act. I am hopeful that through careful management of my father's catalogue, my brothers, sister and I will be able to recoup our legal expenses and to derive some revenues from our father's songs. The irony is, of course that absent an extension of the term of copyright, we will have only a few short years of income from the songs which should rightfully have been a source of income for my father, his children and his grandchildren for many years.").

As Congress considered the CTEA, it understood that one of the rationales behind the creation of the life-plus-50 term in the 1976 Act was that the technology at that time had increased the value of copyrighted works, especially serious works of art:

> Indeed early in the discussions of the first Copyright Office report on revision, term extension was advocated because new media made older works more exploitable. . . . It was repeatedly noted that the value of serious works was often not fully recognized until well into the copyright term . . . . 122 Cong. Rec. 3834 (1976) (statement of Sen. Hugh Scott; "[a] short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years," referring to works of F. Scott Fitzgerald, Theodore Dreiser and Sinclair Lewis).

1995 Senate Hearing 135 (Joint Statement of the Coalition of Creators and Copyright Owners). The digital and Internet revolutions provide the same, if not more imperative, grounds for the CTEA's 20-year extension to protect existing works.

CONCLUSION

Half a century ago, this Court recognized—as did Madison in *The Federalist Papers*—that proper economic remuneration to creators was not only fully consonant with, but also essential to, the public good:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Mazer v. Stein, 347 U.S. 201, 219 (1954).[7] More so than in any other artistic endeavor, the creation of symphonic and concert music requires "sacrificial days." It is only right and just—to say nothing of reasonable—that Congress recognized that copyright term extension for new and existing works was necessary to compensate the composer and two generations of heirs, and to provide for investment in, and preservation, promotion and dissemination of, existing works. For these rational reasons, and a host of others, Congress enacted the CTEA, and so provided the necessary protection and incentives for the promotion of progress of serious American works of art, among them, works of symphonic and concert music.

The decision below should be affirmed.

Respectfully submitted,

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[7] "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals." THE FEDERALIST No. 43 (James Madison).